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CONTENTS

JOURNAL.

	Pages
Musings on 1977—*by* Professor S. Venkataraman. ..	1
New Judges for the High Court. ..	9
A Critical Note on "Renga Iyengar *v.* Sivasamipandaram" (1977) 2 M. L. J. 265 : 90 L. W. 559.—*by* S. Govindarajan, B. Sc., B. L., Advocate and Government Pleader, Chidambaram.. ..	11
Powers Of The Commissioner of Corporation of Madras—*by* R. Thillai Villalan, M. A., B. L. ..	13
Anomaly in The Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XV of 1976)—*by* T. S. Subramanya Iyer, Advocate, Trichy ..	16
Government as a Litigant—*by* V. Laxmanan. ..	22
Conflicting dicisions as to meaning of debt in Debt Legislations—*by* T.R. Venkataramanan, B. Com. B. L., D. P. P. A., Advocate. ..	25
Assets Realisation—Company in Liquidation—*by* Seethaaraam. ..	27
Deletion of Clause (2) in section 47, Civil Procedure Code—*by* T.S. Subramanya Iyer. ..	32
Recruitment, Appoinment and Service Conditions of the Employees of Madras City Corporation under Madras City Municipal Corporation Act (IV of 1919)—*by* R. Thillai Villalan, Madras. ..	33
"Justice to the Policy holder" under section 39 of The Insurance Act (IV of 1938)—*by* T. A. Varadarajan, M. A., B. L., D. P. P. A., Advocate, Standing Counsel, Life Insurance Corporation of India Madurai Division, Tamil Nadu. ..	41
Starting Point of Limitation for a Suit to Redeem an Otti, where there is a Purakadam—*by* R. Balakrishnan, Advocate, Nagercoil. ..	46
Section 25 (d) of the Tamil Nadu Courts-fees and Suits Valuation Act (XIV of 1955)—*by* S. Govindarajan, B. Sc., B. L., Advocate and Government Pleader, Chidambaram. ..	49
Justice Ramaprasada Rao's Appointment as Chief Justice. ..	51
Note on "S. Palanivelu *v.* Veradammal" (1978) 1M.L.J. 212 : A.I. R. 1977 Mad. 342,—*by* S. Govindarajan, B. Sc., B. L., Advocate and Government Pleader, Chidambaram. ..	52
A Note on V. K. Karuppiah and others *v.* Thiruvannamalai Adheenam, I.L.R. (1978) 1 Mad. 343 : 90 L. W. 6620,—*by* S. Govindarajan, B. Sc., B. L., Advocate and Government Pleader, Chidambaram. ..	54

LIBRARY

BOOK REVIEW

	Pages
THE INDUSTRIAL DISPUTET ACT, 1947, by *C. C. Anajwala*, VI Edition, 1977. (Publishers: C. Jamnadas and Company, 146-C, Shamaldas, Gandhi Marg, Bombay-400002) Price Rs. 22. ..	17
THE SUPREME COURT LABOUR DIGEST, 1950-1976, by *S.K. Agrawal*, 1977. (Publishers: Law Book Company, P. B. No. 4, Allahabad. 1) Price Rs. 70. ..	17
WORKING CAPITAL MANAGEMENT by *Anil B. Roy Choudury*, 1978. (Publishers : Eastern Law House, Calcutta) Price Rs. 40: £5 $ 9. ..	18
TAX PLANNING VIA TRUST by *Kumar Parikh* and *Divyakant Parikh*, 1977. (Publishers : Vora Prakasham, Ahmedabad-2) Price Rs. 15. ..	18
TAXATION REFERENCE by *H. K. Saharay* and *Bijoy Sen Gupta*, 1977. (Publishers : Eastern Law House, Calcutta). Price Rs. 40 : £6 $ 12. ..	19
DRAFTING CONVEYANCING AND PLEADINGS by *Dr. G. M. Kothari*, 197 7. (Publishers : N. M. Tripathi (P.) Ltd, Bombay) Price Rs. 60. ..	20
THE IMPORTS AND EXPORTS (CONTROL) ACT, 1947, by *Subodh Markendaya* and *Mitra L. Bhadri*, 1977. (Publishers N. M. Tripathis (P.) Ltd. Bombay) Price Rs. 50. ..	21
THE BOMBAY SHOPS AND ESTABLISHMENTS ACT, 1948 with the MAHARASHTRA SHOPS AND ESTABLISHMENTS RULES, 1961, IV Edition by *C. C. Anajwala* (Publishers : C. Jamnadas and Company, 146-C, Shamaldas, Gandhi Marg, Bombay) Price Rs. 15. ..	19

MARCH OF LAW

		Pages
Introduction.	..	1
Courts : their jurisdiction, powers and duties.	..	1
Constitutional law.	..	2
Industrial and Labour law.	..	7
Contracts and ancillary laws.	..	8
Property law, land tenures and related legislation.	..	11
Insolvency law.	..	15
Hindu law and related legislation.	..	16
Law of Evidence.	..	17
Law of Limitation.	..	18
Civil Procedure Code.	..	19
Criminal law and procedure.	..	25

THE MADRAS LAW JOURNAL

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Puisne Judges.

The Hon'ble Thiru Justice T. Ramaprasada Rao, B.A., B.L. (Chief Justice from 29-5-78)

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" " S. Nainar Sundaram, B.COM., B.L., " "

" " G. Maheswaran, B.SC. B.L., Appointed on 1-6-78.

The Advocate-General

" " V. P. Raman, B.SC., B.L.

TABLE OF CASES REPORTED

SUPREME COURT

	Pages
Cumbum Roadways (P.) Limited *v.* Belaguru Bus Service Private Limited. ..	7
M/s.V. Guruviah Naidu *v.* State of Tamil Nadu. ..	1
Madras Refineries Limited *v.* Chief Controlling Revenue Authority, Board of Revenue ..	8
Palaniappa Gounder *v.* State of Tamil Nadu. ..	13

HIGH COURT

FULL BENCH

The Chief Controlling Revenue Authority, Board of Revenue *v.* V.Daniel ..	327
M/s. Traders and Traders *v.* State of Tamil Nadu ..	477

OTHER CASES

K.M.S. Abdul Hasan *v.* The Tiruvarur Municipality. ..	121
V.K. Abraham *v.* N.K. Abraham. ..	331
Adhu *v.* V.N. Palaniswamy Gounder. ..	16
Alvel Sales *v.* Dujodwala Industries. ..	171
Balasubramaniam *v.* Purushothaman. ..	187
P.D. Balasubramanian *v.* The Corporation of Madras. ..	325
Bandi Chalapathy Rao *v.* The Official Assignee. ..	316
V. Bapu Kalingarayar *v.* Rajam. ..	67
Booraswami *v.* Rajakannu. ..	248
Canara Bank *v.* Indian Bank. ..	346
Chand Basha *v.* Pyari Bi. ..	46
Charles Robson *v.* State of Tamil Nadu ..	413
Chellammal *v.* Valliammal ..	391
Chinnathayi *v.* Narayanaswami Kounder. ..	49
R.R. Dalavai *v.* The Government of Tamil Nadu. ..	93
K. Daniel Nadar *v.* R. Ananthan Pillai. ..	125
S.G. Desai *v.* The Director of Education. ..	517
M.S. Dharma Raja *v.* M.K. Rama Ammal. ..	492
Doraiswami *v.* Rettinammal. ..	456
G. Duraikannu *v.* A. Natesa Pillai. ..	296
S. Duraiswamy Nadar *v.* Addl. Special Deputy Collector. ..	532
Eni Ammal *v.* Soosai Michael Mudaliar. ..	146
R.P. Ganesan *v.* The Collector of Madras. ..	280
Ganeshmal Maggaji *v.* The Central Board of Excise and Customs. ..	287
A. Gangadharan *v.* The Govt. of India. ..	365
S. Gatikachala Mudaliar *v.* State of Tamil Nadu. ..	109
J.N. Gulamali *v.* Howrah Casting Company. ..	218
S. Jabaperumal *v.* Central Bank of India. ..	312
K.K. Jacob *v.* The Madurai University. ..	440
M.M. Jaffer Kermani *v.* M.M. Hassan Kirmani. ..	103
K.N.E. Jaganatha Iyer *v.* State of Madras. ..	19
V. Kamalanathan *v.* E.I.D. Parry Limited ..	25
K. Kanagasabapathy *v.* City Supply Officer, Civil Supplies Department. ..	184
S.S. Khader Mohammed Rowther and Company *v.* G.S. Sundaram. ..	79
Kumaraswami Gounder *v.* Subba Gounder. ..	305

		PAGES
Kumudavalli Ammal *v.* P.N. Purushotham	..	261
Lakshmana Chetty *v.* M.S. Askar Ahmed.		342
M/s. India Automobilies and Company *v.* Life Insurance Corporation of India.	..	178
M/s. Nilgiri Dairy Farm *v.* Manoharan.	..	357
M/s. Southern Roadways Limited *v.* The Assistant Commissioner.	..	115
M/s. Southern Steelmet and Alleys Ltd. *v.* R.M. Steels.	..	468
The Madras State Wakf Board *v.* Vellayan Chettiar		542
R. Manickam *v.* The Union Territory of Pondicherry.	..	28
M.C. Manickam Chettiar *v.* The Madras City Municipal Corporation.	..	371
V.K. Margachari *v.* M.R. Krishnaswami Mudaliar.	..	74
Marimuthu Muthiriar *v.* Ayyathurai.	..	169
Mariam Bivi *v.* Nathrsa Rowther Trust.	..	259
Marudambal Ammal *v.* Marudanayagam Pillai.	..	471
Meenambal *v.* Chockalinga Chettiar.	..	398
S. Misirilal *v.* The Accommodation Controller.	..	52
P.V. Mohammed Ghouse *v.* State of Tamil Nadu.	..	339
M.A.B. Mohammed Sultan Mohideen *v.* Official Trustee, Madras.	..	190
K. Mohideen Ibrahim *v.* M. Mohammed Abdullah.	..	386
Munia Reddiar *v.* The Board of Revenue.	..	7
Muthu Krishna Naidu *v.* T.M. Thamothara Chowdry.	..	351
Nagammal *v.* State of Tamil Nadu.	..	450
H.L. Nantha *v.* T.C. Ramalingam Pillai.	..	344
Nestle's Products (India) Ltd. *v.* P. Thankaraja.	..	417
Padmavathi and Bheema Raja *v.* State of Tamil Nadu.	..	223
S. Palanivelu *v.* K. Veradammal.	..	212
Panchalai Ammal *v.* Muthulakshmi Ammal.	..	314
Pappu Ammal *v.* M/s. Lab Chemicals.	..	523
A.K. Parvathambal *v.* Attimuthu Gounder.	..	196
K.P. Periyannan *v.* Deity Venugopalakrishnaswamy.	..	362
Ponnuthayee Ammal *v.* Kamakshi Ammal	..	48
Raghveera Sons *v.* Mrs. Padmavathi.	..	36
K. Ramanujam Chettiar *v.* Arunachaleswarar Devasthanam	..	432
C.V. Ramaswami Naidu *v.* C.S.Shyamala Devi.	..	505
Ranganayaki Ammal *v.* S.R. Srinivasan.	..	56
Reethalammal *v.* K. Arumugham Pillai	..	536
E. Retnamma Pillai Thankachi *v.* P. Kamalam Mudaliar.	..	186
The Revenue Divisional Officer, *v.* A.N. Damodara Mudaliar	..	267
Santhakula Sowmiyanarana Kavaraya Community Endowments *v.* Vellayappa Pillai.	..	354
The Savamalai Estates Limited *v.* P.M. Kannayan	..	424
The Secretary to Government, Home Department *v.* T.V. Hari Rao	..	460
Seth Khiaram Khushiram *v.* Kamadhenu Drinks.	..	149
G. Shanmugham Chetty *v.* Chinnammal	..	405
R. Singaravelu *v.* Govindasami Chettiar.	..	276
R. Sivagnanam *v.* P.K. Sadananda Mudaliar.	..	164
K.S. Somasundaram *v.* The Secretary, Railway Board, Rail Bhawan	..	272
N. Soundarapandian *v.* Vallioor Panchayat Union Council.	..	23
Sri Tirumeni Alagar Devasthanam *v.* State of Tamil Nadu.	..	118
V. Sridhar *v.* State of Tamil Nadu	..	437
R. Srinivasan *v.* S.P. Krishnamoorthy Sarma	..	452
State of Tamil Nadu *v.* M/s. Saraswathy Kurwath Damodaran.	..	43
State Trading Corporation of India Limited *v.* K.V. Vaidyalingam.	..	345
S. Subramaniam *v.* V. Vellaikannu	..	550

PAGES.

Sundarsanam v. The Thiruvannamalai Municipal Council, .. 138
Swamiappa Gounder v. Vettakaranpudur Mahajana Bank Limited. .. 54
V. Thiagarajan v. Mohammed Umar Sait. .. 5
V. Usman Koya v. R. Muthukrishnan. .. 10
V.O.C. Industrial Workers Co-operative Housing Society v. M. Kuppuswami .. 382
Valliammal v. Palaniswamy .. 463
C. Vasantha v. S.C. Pandian .. 1
Velu Pandar v. Prakasam 141
S. Venkataraman v. The Deputy Registrar of Co-operative Societies .. 284
S.Y. Venkateswaralu v. The Director General of Ordnance Factories .. 13
Villa Venkata Rao v. Satyanandan Mummidi .. 529

TABLE OF CASES CITED

[SUPREME COURT]

PAGES.

A

Adamji Umar Dalal *v.* State of Bombay, 1951 S.C.J. 820: 1952 S.C.R. 172: 54 Bom. L.R. 400 : A.I.R. 1952 S.C. 14 .. 17

Firm A.T.B. Mehtob Majid and Company *v.* State of Madras, (1963) 14 S.T.C. 355 : (1964) 1 An. W.R. (S.C.) 115: (1964) 1 M.L.J. (S.C.) 115: (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928 .. 4, 5

A. Hajee Abdul Shukoor and Company *v.* State of Madras, (1964) 15 S.T.C. 719: (1965) 1 S.C.J. 337: (1965) 1 M.L.J. (S.C.) 39: (1965) 1 An. W.R. (S.C.) 39: (1964) 8 S.C.R. 217: A. R. 1964 S.C. 1729. .. 4, 5

Lim or Asphalte Paving Co. *v.* I.B.C. (1872) 7 Ex. 211 .. 10

State *v.* Pandurang Shinde, A.I.R. 1956 Bom. 711 . 16

TABLE OF CASES CITED.

HIGH COURT

PAGES

A

T.S.O. Abdul Khader v. G.H. Rao, (1964) 2 M.L.J. 288 .. 539, 541
Adakalathammal v. Chinnayan Panipunder, (1959) 1 M.L.J. 314: 72 L.W. 358: A.I.R. 1959 Mad. 447 .. 546, 548
Additional District Magistrate, Jabalpur v. S. Shukla, (1976) 2 S.C.C. 521: (1976) Cr. L.J. 945: A.I.R. 1976 S.C. 1207 .. 112
Adhikesavan Naidu v. Gurunatha Chetti, (1917) I.L.R. 40 Mad. 338 : 32 M.L.J. 180: 5 L.W. 425: A.I.R. 1918 Mad. 1315 .. 211
P.A. Aiyanath Chetty v. V. Pala Muddu Krishnayya and Company, (1956) 2 M.L.J. 54: 69 L.W. 282 ... 638
Ajit Singh v. State, (1972) Mah. L.J. 103: 74 Bom. L.R. 345: I.L.R. (1972) Bom. 1147: A.I.R. 1972 Bom. 177. .. 233
Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju, (1936) 71 M.L.J. 558: 63 I.A. 397: A.I.R. 1936 S.C. 264 .. 257, 258
P.S.N.S. Ambalavana Chettiar and Company v. R.P.F. Commissioner, (1970) 1 L.L.J. 296: (1969) 2 M.L.J. 160: 82. L.W. 297: A.I.R. 1970 Mad. 194 .. 368
Amriteswari Debi v. Secretary of State, (1897) I.L.R. 24 Cal. 504 ... 83
Anil Behari Ghose v. Smt. Latika Bala Dassi, 1955 S.C.J. 578: (1955) 2 S.C.R. 270: (1955) 2 M.L.J. (S.C.) 84: A.I.R. 1955 S.C. 566 .. 167, 411
Anisminic Limited v. Foreign Compensation Commission, (1969) 2 A.C. 147 .. 91, 92
Anumukonda Anjaneyalu v. Agricultural Traders, A.I.R. 1973 A.P. 219 .. 336
Appanna Poricha v. Narasinga Poricha, (1921) 41 M.L.J. 608: 15 L.W. 18: I.L.R. 45 Mad. 113: A.I.R. 1922 Mad. 17 .. 108
Arokia Manikaran v. Sowrivaru Manikaran, (1952) 8 D.L.R. Trav.-Co. 203 .. 515
S. Arputam Chettiar v. C.P. Narayana Rao, (1962) 75 L.W. 523 .. 539
Arumugham v. National Palayamkot Company, (1973) 2 M.L.J. 380 .. 528
Assistant Custodian, Evacuee Property v. Brij Kishore Agarwala, (1975) 1 S.C.C. 21: (1975) 2 S.C.R. 359: A.I.R. 1974 S.C. 2325 .. 447
Associated Cement Companies Limited v. Ramakrishna, I.L.R. (1965) 1 Mad. 237: 77 L.W. 629: A.I.R. 1965 Mad. 318 ... 217
Associated Cement Companies Ltd v. P.M. Sharma, (1966) 1 S.C.J. 786: (1965) 2 S.C.R. 366: A.I.R. 1965 S.C. 1595 .. 560
Associated Cement Companies Limited (Chibesa Cement Works) Jhinkpani v. Their Workmen, (1950) 1 L.L.J. 1 .. 368, 369
Attorney-General of Southern Nigeria v. John Holt and Company, Liverpool Limited, (1915) A.C. 599 ... 390

B

Babu Ganga Prasad v. Baboo Inderjit Singh, (1875) 23 Suth. W.R. 390. (P.C.) ... 338
Babu Ram Sharma v. Bal Singh, (1959) 61 Pun. L.R. 33 .. 89
Bahadur Singh v. Muni Subrat Dass, (1969) 2 S.C.R. 432 .. 87, 88, 89
Balkishan Das v. Ram Narain Sahu, (1903) I.L.R. 30 Cal. 738 .. 403
Bapanna v. Jaggiah, A.I.R. 1939 Mad. 811 .. 135
Basang Singh v. Janaki Singh, (1967) 1 S.C.J. 476: (1967) 1 S.C.R. 1: A.I.R. 1967 S.C. 341 .. 64
Bawa Chattagir v. Natanmal, (1909) 4 I.C. 359 .. 385, 386
Bengal Insurance and Real Property Company Limited v. Velayammal, I.L.R. (1937) Mad. 990: 45 L.W. 616: A.I.R. 1937 Mad. 571 .. 309
Bhagat Ram v. State of Punjab, (1973) 1 S.C.R. 92: A.I.R. 1972 S.C. 1571 .. 557
Bharat Basi v. Gopinath, A.I.R. 1941 All. 385 .. 463
Bhasimukhi v. Parbati Sunkar, A.I.R. 1919 Cal. 295 ... 385
Bhogilal v. Amritlal, (1893) I.L.R. 17 Bom. 173 ... 187
Bishandas v. State of Punjab, (1962) 2 S.C.R. 69: A.I.R. 1961 S.C. 1570 ... 216
Bishwanath v. Sri Thakur Radha Ballabji, (1967) 2 S.C.J. 331: (1967) 2 S.C.R. 618 : A.I.R. 1967 S.C. 1044 ... 454
Board of Revenue v. Dr. Manjunatha Rai, (1976) 2 M.L.J. 279: A.I.R. 1977 Mad. 10. .. 330
Bojjamma v. Venkataramayya, (1898) I.L.R. 21 Mad. 30 ... 72
Bolton v. Madden, (1873) L.R. 9 Q.B. 55 .. 379

PAGES

Breen v. Amalgamated Engineering Union, (1971) 1 All E.R. 1148 .. 561
Brettinghaum-Moore v. Municipality of St. Leonards, (1969) 121 C.L.R. 509 .. 243
Bull v. Bull, (1955) 1 All E.R. 253 .. 515
Bunn v. Guy, (1803) 4 East 190 .. 379
Cairncross v. Lorimer, (1860) 3 Macqs. 827 .. 216
Century Spinning and Manufacuring Co., Ltd. v. The Ulhasnagar Municipal Council, (1970) 2 S.C.J. 689: (1970) 3 S.C.R. 854: A.I.R. 1971 S.C. 1021 .. 447

C

Chandirappa v. Danaya, (1895) I.L.R. 19 Bom. 593 .. 403
Chandra Mohini v. Avinash Prasad, (1967) 1 S.C.R. 864: (1967) 1 S.C.J. 42 : A.I.R. 1967 S.C. 581 .. 51
Chandradhar Goswami v. Ganpati Bank Limited, (1967) 1 Comp. L.J. 98: (1967) 1 S.C.R. 898: A.I.R. 1967 S.C. 1058 .. 337
Chappel and Company Limited v. Nestle Company Limited, (1960) A.C. 87 .. 380
Charahalu Siva Reddi v. The Official Receiver of Bellary, (1936) 71 M.L.J. 730: 44 L.W. 651: A.I.R. 1937 Mad. 13 .. 157
K.K. Chari v. R.M. Seshadri, (1974) 1 S.C.J. 17 : (1974) 1 M.L.J. (S.C.) 14 : (1974) 1 An W.R. (S.C.) 14: (1963) 3 S.C.R. 691: (1973) 1 S.C.C. 761: A.I.R. 1973 S.C. 1311 .. 86, 88
Chellammal v. Abdul Gaffoor Sahib, (1961) 2 M.L.J. 222: I.L.R. (1961) Mad. 1061: 74 L.W. 556: A.I.R. 1962 Mad. 1 .. 55, 56
Chief Controlling Revenue Authority Board v. Hamid Sultan, (1975) 88 L.W. 27 : (1975) 2 M.L.J. 36: A.I.R. 1975 Mad. 161 .. 331
Chinnakuzhandai Ammal v. Veerasami Mudaliar, 14 L.W. 281: 68 M.L.J. 713: A.I.R. 1935 Mad. 312 .. 73
Chinnammal v. Papathi Ammal, A.I.R. 1925 Mad. 986 .. 189
Chinnapareddigari Pedda Muthyalareddy v. Chinnappareddigari Venkatareddy, (1969) 1 An.W.R. 396 .. 254
Chinnaswami Naicker v. Kandasami Gounder, (1969) 1 M.L.J. 393: A.I.R. 1970 Mad. 81 .. 71
Collector of Madras v. K. Gokale, (1976) 1 M.L.J. (S.N.) 3 .. 283
Commissioner of I.T. v. Ahmedbhai Umarbhai and Company, 1950 S.C.J. 374: 18 I.T.R. 472: 1950 S.C.R. 335: A.I.R. 1950 S.C. 134 .. 491
Commissioner of I.T. v. Bhogilal Lal Chand, (1954) S.C.J. 122 : 25 I.T.R. 50: 1954 S.C.R. 444: A.I.R. 1954 S.C. 155 .. 491
Connolly to Sheridan and Russel, *Ex parte* (1900) 1 I.R. 1 .. 435
Cooke v. Head, (1972) 2 All E.R. 38 .. 515
Cooper v. Wandsworth Board of Works, (1863) 14 C.B.N.S. 180 .. 562
Corporation of Calcutta v. Smt. Padma Debi, (1962) 3 S.C.R. 49 : A.I.R. 1962 S.C. 151 .. 101
Currie v. Misa, (1875) L.R. 10. Ex. 153 .. 378

D

D.F.O. South Kheri v. Ram Sanehi Singh, (1971) 3 S.C.C. 864: A.I.R. 1973 S.C. 205 .. 562
Damodar Rao v. Bhima Rao, A.I.R. 1965. Mys. 290 .. 133
Damodara Menon v. P.A. (L.A.) to District Collector, (1975) K.L.T. 537 .. 341
Dasaratha Rami Reddy v. Subbarao, (1957) S.C.J. 835: 1957 S.C.R. 1122: (1957) 2 M.L.J. (S.C.) 175 : (1957) 2 An. W.R. (S.C.) 175: A.I.R. 1957 S.C. 797 .. 303
David v. Daniel, (1967) 1 M.L.J. 110 .. 525
De Cordoya v. Vick Chemical Company, (1961) 68 R.P.C. 103 .. 421
Delhi Municipality v. M.N. Soi, (1976) R.C.J. 763: (1976) 4 S.C.C. 535: A.I.R. 1977 S.C. 302 .. 101
Denby (William) and Sons Ltd. v. Minister of Health, L.R. (1936) 1 K.B. 337 .. 558
Deoki Nandan v. Murlidhar, (1957) S.C.J. 75 : 1956 S.C.R. 756 : (1957) 1 M.L.J. (S.C.) 28: (1957) 1. An. W.R. (S.C.) 28: A.I.R. 1957. S.C. 133 .. 301
V.C. Dev v. Special Land Acquisition Officer, A.I.R. 1960. Bom. 232 .. 270
Devi Films (P) Ltd. v. State of Madras, (1961) 12 S.T.C. 274 .. 480, 484, 490
Dharmo v. Balamukund, (1896) I.L.R. 18 All. 458 .. 187
The Digambar Parshwanth Jain Mandir v. Valubhai, A.I.R. 1961 Bom. 221 .. 434
Director of Public Prosecutions v. Bhagwan, (1970) 3 All E.R. 97 .. 243

PAGES.

Director of School Education v. Rev. Brother C. Arogiaswamy, (1971) 1 M.L.J. 325: 84 L.W. 195 : A.I.R. 1971 Mad. 440 .. 414, 415, 416
District Controller of Stores v. A.C, Taxation Officer, (1976) 37 S.T.C. 423 : (1976) Tax. L.R. 1453: (1976) S.C.C. 660 : A.I.R. 1976 S.C. 489 .. 45
Dolgobinda v. Nimalcharan, (1960) S.C.J. 879: A.I.R. 1959 S.C. 914 .. 461
Dunlop Pneumatic Tyre Company Limited v. Selfridge and Company Limited, (1915) A.C. 847 .. 379
Duraiswami Mudaliar v. Secretary of State for India in Council, (1939) 2 M.L.J. 6: 49 L.W. 773 : A.I.R. 1939 Mad. 648 .. 238

E

The Eastman Photographic Materials Company Ltd. v. The Comptroller-General of Patents, Designs and Trade Marks, (1898) A.C. 571 .. 420
Easwara Pillai v. State of Tamil Nadu, (1972) 1 M.L.J. 92: 85 L.W. 894 227, 228, 235, 239, 241, 244 246
Easwaran Chettiar v. Subbarayan, (1970) 83 L.W. 696: A.I.R. 1971 Mad. 163 220, 221, 222
Ebrattennessa Bibi v. Saratchandra, A.I.R. 1934 Cal. 14 .. 135
Egappa Gounder v. Special Tahsildar, (1970) 83 L.W. 561 .. 271

F

Fakiruddin Sahib v. Ramaswami Mudaliar, (1965) 1 M.L.J. 167 .. 214
Fateh Chand v. Balkishan Das, (1964) 1 S.C.R. 515 : (1964) 1 M.L.J. (S.C.) 60 : (1964) 1 An. W.R. (S.C.) 60 : (1964) 1 S.C.J. 187 : A.I.R. 1963 S.C. 1405 .. 429
Ferozi Lal v. Man Mal, A.I.R. 1970 S.C. 794 .. 88
Furnell v. Whangrei High Schools Board, (1973) 2 W.L.R. 92 .. 242

G

Ganapathi v. Kumaraswami, (1975) 2 M.L.J. 171: 88 L.W. 525 : A.I.R. 1975 Mad. 383 .. 12
Gangu Veera Brahman v. Gangu Jaganadhacharyulu, (1935) 69 M.L.J. 184: 42 L.W. 427 : A.I.R. 1935 Mad. 589 (2) .. 157
Ganpat Pujari v. Kanaiyalla Marwari, A.I.R. 1933 Pat. 246 .. 434
Gappulal v. Thakurji Shriji Dwarakadheeshi, (1969) 2 S.C.J. 810 : (1969) 1 S.C.C. 792 : A.I.R. 1969 S.C. 1291 .. 540
The General Manager, South Central Railway v. A.V.R. Sidhanti, (1974) 3 S.C.R. 207 : (1974) 4 S.C.C. 335 : A.I.R. 1974 S.C. 1755 .. 275
General Manager, South Central Railway v. T. Venkata Rao, (1975) 4 S.C.C. 619 : A.I.R. 1976 S.C. 678 .. 273, 275
Ghousia Begum v. Union Territory, A.I.R. 1975 Mad. 345 .. 31, 35, 227
Girindra Chandra Pal Chowdhuri v. Sree Nath Pal Chowdhuri, (1906) 3 Cal. L. J. 141 .. 181
Glamour Saree Museum v. Tamil Nadu Handloom Weavers Co-operative Society, (1970) 83 L.W. 13 : (1969) 2 M.L.J. 493 220, 221, 222
Globe Theatres v. Labour Court, (1965) 1 L.L.J. 243 .. 368
Gobinda Mal v. Santa, (1915) 26 I.C. 441 .. 70
Gokul Chit Fund v. T.K.O. Vareed, (1977) 47 Comp. Cases 264: (1976) K.L.T. 747 : A.I.R. 1977 Ker. 68 .. 323
Gokuldas Dahyabhai v. Jiva Raghay, A.I.R. 1955 Sau. 52 .. 538
Gopal Chettiar v. Shanmuga Nadar and Bros., (1967) 1 Mad. L.J. 163 : 79. L.W. 697 : A.I.R. 1967 Mad. 360 .. 336
Gopal Das v. Sri Thakurji, (1943) 2 M.L.J. 51 : 56 L.W. 593 : A.I.R. 1943 P.C. 83 .. 466
Gopalakrishna Pillai v. Meenakshi Ayal, (1967) 1 An. W.R. (S.C.) 89 : (1967) 1 M.L.J. (S.C.) 89; (1967) 1 S.C.J. 450 : A.I.R. 1967 S.C. 155 .. 3
Gopalan v. State of Madras, (1958) 2 M.L.J. 117 : 71 L.W. 672 : I.L.R. (1958) Mad. 798: A.I.R. 1958 Mad. 539 547
Gopayya v. Deputy Collector of Tenali, 42 M.L.J. 298 : 15 L.W. 366 : (1922) I.L.R. 45 Mad. 421 : A.I.R. 1922 Mad. 100 (2) .. 284
Goripalayam Durga v. Kesavaswami Iyer, (1949) 2 M.L.J. 153 : (1949) M.W.N. 466 .. 136
Government of India v. National Tobacco Company, (1977) 1 A.P.L.J. 224: (1977) 2 An. W.R. 1 : A.I.R. 1977 A.P. 250 .. 295
Gowri Ammal v. Thulasi Ammal, (1962) 75 L.W. 559 : A.I.R. 1962 Mad. 510 .. 449
Gunnaji Bhawaji v. Mahanji Khoosalchand, (1910) I.L.R. 34 Bom. 250 .. 70

PAGES

Guntur Municipal Council v. Ratepayers' Association, (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 An. W.R. (S.C.) 7 : (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353 .. 101,122,124
P.J. Gupta and Company v. M. Venkatesan, (1975) 1 S.C.C. 46 : A.I.R. 1974 S.C. 2331 .. 539
Gurumurthi v. Shivayya, (1898) I.L.R. 21 Mad. 391 .. 72
Guruswamy v. Collector and Inspector of Panchayat, (1977) 2 M.L.J. 326 .. 556

H

Hari Ramjee Gore Sastri v. The Malabar Dt. Board, Kozhikode, (1950) 2 M.L.J. 810 : A.I.R. 1951 Mad. 493 .. 184
Hindu Mish v. Heramba Chandra, (1911) 13 C.L.J. 139 .. 70
Hindusthan Forest Company v. Lalchand, 1960 S.C.J. 41 : A.I.R. 1959 S.C. 1349 .. 335, 336
Hirada Basappa v. G. Mudappa, (1870) 6 Mad. H.C.R. 142 .. 334
Hoffmann-La Roche and Co., Ltd. v. Geoffrey, Manners & Co., (P) Ltd., (1970) 2 S.C.R. 213 : (1970) 2 S.C.J. 621 : A.I.R. 1970 S.C. 2062 .. 421

I

Imambandi v. Rahimbai, I.L.R. 49 Bom. 586 : A.I.R. 1925 Bom. 378 .. 389
Inderjit C. Parekh v. State of Gujarat, (1975) 1 S.C.C. 824 : A.I.R. 1975 S.C. 1182 .. 22
Indore Municipality v. Ratnaprabha, (1976) 4 S.C.C. 622 : (1977) R.C.J. 443 : A.I.R. 1977 S.C. 308 .. 102
K. Ismail v. Pavu Ammal, (1955) 2 M.L.J. 184 : 68 L.W. 500 : A.I.R. 1955 Mad. 644 .. 346
Issardas v. Collector of Madras, (1959) 2 M.L.J. 136: (1959) M.L.J. (Crl) 601: 72 L.W. 726: A.I.R. 1959 Mad. 528 .. 523
Iyall v. Lord Northfield, (1914) 3 K.B. 911 .. 390

J

Jafar Ali v. Choitram, (1957) 1 An. W.R. 348 : (1957) An. L.T. 399 .. 538
P.M. Jagadesa Mudaliar v. N.C.C. Angappa Mudaliar, (1966) 79 L.W. 615 .. 539
Jagannath v. Abdul Azia, A.I.R. 1973 Delhi 9 .. 541
V.R. Jayaraman v. N.S. Ramalingam, 1973 T.L.N.J. 393 .. 220
Jogeshwar Roy v. Raj Narain Mitter, (1904) I.L.R. 31 Cal. 195 .. 70
Jugal Kishore v. Ashok Mills, A.I.R. 1961 Pat. 330 .. 17

K

K. Kanna Reddy v. K. Venkata Reddy, (1965) 1 An. W.R. 384 .. 255
Kannappa Chettiar v. Veeraswami, (1972) 1 M.L.J. 184: 85 L.W. 192 : A.I.R. 1972 Mad. 303 .. 539
T.M. Kanniyan v. Income-tax Officer, (1968) 1 I.T.J. 466 : (1968) 2 S.C.J. 727 : (1968) 2. S.C.R. 103 : 68 I.T.R. 244 : A.I.R. 1968 S.C. 637 .. 30, 33
Karnani Industrial Bank Ltd. v. Bengal Province, A.I.R. 1949 Cal. 47 .. 429
Karpagathachi v. Nagarathinathachi, (1965) 2 An. W.R. (S.C.) 61 : (1965) 2 S.C.J. 445 : (1965) 2 M.L.J. (S.C.) 61 : A.I.R. 1965 S.C. 1752 .. 394
Kaushalya v. K.L. Bansal, (1969) 2 S.C.J. 145 : (1969) 2 S.C.R. 1048 : A.I.R. 1970 S.C. 838 .. 88
Kedarnath v. Shenonarain, (1970) 2 S.C.R. 204: A.I.R. 1970 S.C. 1717 .. 148
Kerala Education Bill, 1957, In re, 1959 S.C.R. 995 : 1959 S.C.J. 321 : A.I.R. 1958 S.C. 956 .. 416
Kesava Chettiar v. Ramanathan Mudaliar, (1960) 1 M.L.J. 452 : A.I.R. 1959 Mad. 470 .. 335
M. Kesava Gounder v. D.C. Rajan, (1976) 1 M.L.J. 56 : 89 L.W. 205 : A.I.R. 1976 Mad. 102 .. 504
Kesava Mills Company Limited v. Union of India, (1973) 3 S.C.R. 22 : (1973) 1 S.C.C. 380 : A.I.R. 1973 S.C. 389 .. 562
Kesavan v. South Indian Bank Limited, I.L.R. (1950) Mad. 251 : 62 L.W. 465: (1949) 2 M.L.J. 70 : A.I.R. 1950 Mad. 226 .. 41

PAGES

Keshari Chand v. Shillong Banking Corporation Limited, 35 Comp. Cas. 514 : (1965) 1. Comp. L.J. 355 : (1965) 2 S.C.J. 174 : A.I.R. 1965 S.C. 1711 .. 335
Killick Nixon Limited v. V.B. Narayana Rao, (1974) 1 M.L.J. 16 (S.N.) .. 48
Kishinchand v. Ramchand, A.I.R. 1937 Sind. 247 .. 385
Kochuni Nayer v. District Collector, (1957) Ker. L.T. 1041 .. 562
S.N. Komaraswami Goundar, In re, (1951) 1 M.L.J. 422 : 64 L.W. 730 : A.I.R. 1951 Mad. 766 .. 12
Konda v. Ramaswami, (1915) I.L.R. 38 Mad. 1 : 6 L.W. 564 .. 389, 390
A.K. Kraipak v. Union of India, (1970) 1 S.C.J. 381 : (1970) 1 S.C.R. 457 : A.I.R. 1970 S.C. 150 241, 560, 562
Krishna Ayyar v. Krishnaswami Ayyar, (1900) I.L.R. 23 Mad. 597 .. 72
Krishna Chandra v. Dhanathandar & Company, A.I.R. 1935 Cal. 225 .. 323, 324
Krishnaswami Thevar v. Perumal Konar, (1961) 1 M.L.J. 169 .. .. 547, 548, 549
Krishniah v. Seshachalam, (1965) 1 M.L.J. (S.C.) 86 : (1965) 1 An.W.R. (S.C.) 86 : 1965 1 S.C.J. 533 : A.I.R. 1965 S.C. 639 .. 55
Kruger Towns wear Limited v. Northern Assurance Company Ltd., (1953) 1 W.L.R. 1049 .. 385
Kumaraswami Gounder v. Aravagiri Gounder, (1974) 1 M.L.J. 413 : 87 L.W. 215 : A.I.R. 1974 Mad. 239 252, 254, 255
Kuppuswamy Chetty v. Ayyammai Ammal, A.I.R. 1935 Mad. 723 .. 433

L

Lachmeshwar v. Keshwar Lal, (1940) F.C.R. 84 : (1941) 1 M.L.J. (Supp.) 49 : 53 L.W. 373 : A.I.R. 1941 F.C. 5 .. 194
Lakshmi v. Official Ass'gree. (1950) 1 M.L.J. 123 : I.L.R. (1950) Mad. 395 : 63 L.W 115 : A.I.R. 1950 Mad. 410 (F.B.) .. 319
Lakshmi Ammal v. Narayanaswami Naicker, (1950) 1 M.L.J. 63 : 63 L.W. 21 : A.I.R. 1950 Mad. 321 .. 194
Lakshmi Hirala and Company v. Damjikhimji and Company, A.I.R. 1969 Bom. 73 .. 436
Lakshminarasimhan v. Lakshmi Pathi, A.I.R. 1931 Mad. 830 .. 134
Lal Bahadur Singh v. Sispal Singh, (1892) I.L.R. 14 All 498 .. 402
Lalit Mohan Singh Roy v. Chukkun Lal Roy, (1897) I.L.R. 24 Cal. 834 .. 474
Laxman v. Manjunatha, A.I.R. 1921 Bom. 458 .. 385
T. Linga Gowder v. State of Madras, represented by the District Forest Officer, (1970) 1 M.L.J. 503 : A.I.R. 1971 Mad. 28 .. 377
Lokmanya Mills Bansi Limited v. Barasi Borough Municipality, (1962) 1 S.C.J. 123 : (1962) 1 S.C.R. 306 : A.I.R. 1961 S.C. 1358 .. 98

M

M/s. Mechelec Engineers and Manufacturers v. M/s. Basic Equipment Corporation (1976) 4 S.C.C. 687 : 90 L.W. 82 (S.N.) : A.I.R. 1977 S.C. 577 .. 27, 39
M/s. P.N. Shenoy v. B.V. Shenoy, (1970) 2 S.C.J. 601 : (1970) 3 S.C.R. 734 : A.I.R. 1971 S.C. 942. .. 53
Ma Shwe Mys v. Maung Ma Hnaung, (1921) I.L.R. 48 Cal. 823 .. 72
Macdonald v. Macdonald, (1957) 2 All E.R. 690 .. 515
Mackertich v. Stewart and Company Limited, A.I.R. 1970 S.C. 839 .. 74
R.S. Madanappa v. Chandramma, (1966) 2 S.C.J. 310 : (1965) 3 S.C.R. 283 : A.I.R. 1965 S.C. 1812 .. 216
Madina Bidu Sahiba v. Ismail Durga Association, (1940) 1 M.L.J. 872 : 51 L.W. 608 : I.L.R. (1940) Mad. 808 : A.I.R. 1940 Mad. 789 .. 71
Madras Radiotors and Pressings v. State of Tamil Nadu, (1976) 37 S.T.C. 123 : (1976) Tax. L.R. 1533 478, 480, 481, 482, 488, 491
Mahabir Prasad v. State of U.P., (1971) 1 S.C.J. 256 : (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302 .. 559
Maharajah Maheshur Singh v. Bengal Government, (1857-59) 7 M.I.A. 283 .. 71
Mahipal Singh v. Regional Provident Fund Commissioner, (1972) Lab. I.C. 1202 .. 370
Mallesappa v. Mallappa, A.I.R. 1961 S.C. 1268 .. 63
Mangalabhai v. State of Gujarat, A.I.R. 1964 Guj. 82 .. 22
Manicka Chetti v. Kuppusami Asari, A.I.R. 1926 Mad. 644 .. 171
Manikkanarasimhachari v. Ramasubbier, (1970) 1 M.L.J. 337 : 82 L.W. 677 .. 454, 455
Mathilda Sice v. Fritz Gaebele, A.I.R. 1926 Mad. 955 .. 337

PAGES.

Maula Bux v. Union of India, (1970) 1 S.C.R. 928 : (1970) 2 M.L.J. (S.C.) 61 : (1970) 2 S.C.J. 249 : (1970) 2 An. W.R. (S.C.) 61 : A.I.R. 1970 S.C. 1955 .. 430
Mawasi Raji Ram v. Mt. Manbharai, A.I.R. 1964 Punj. 226 .. 187
Mayer Simen v. Advocate-General, A.I.R. 1975 Ker. 57 .. 560
Mehsin Bhai v. Hale and Company, (1964) 77 L.W. 194 .. 525
Menakuru Dasaratharami Reddi v. Duddukuru Subba Rao, 1957 S.C.J. 835 : 1957 S.C.R. 1122 : (1957) 2 An. W.R. (S.C.) 175 : (1957) 2 M.L.J. (S.C.) 175 : A.I.R. 1957 S.C. 797 .. 502
Milkhirami (India), Private Limited v. Chamanlal Brothers, (1966) 2 S.C.J. 606 : A.I.R. 1965 S.C. 1698 .. 26, 42
Mohamed Ali Sheriff v. Venkatapathi Raju, 39 M.L.J. 449 : 11 L.W. 537 : A.I.R. 1920 Mad. 634 .. 212
Mohamed Amir v. Municipal Board, (1966) 1 S.C.J. 484 : A.I.R. 1965 S.C. 1923 .. 397
Mohammed Haji v. A. Moshin Raja, (1948) 61 L.W. 387 (2) : (1948) 1 M.L.J. 456 : A.I.R. 1948 Mad. 440 .. 538
Mohammed Ihtisham Ali v. Jamna Prasad, (1921) 48 I.A. 365 : 15 L.W. 104 : A.I.R. 1922 P.C. 56 .. 466
Mohori Bibee v. Dhormodas Ghose, (1903) I.L.R. 30 Cal. 539 : 30 I.A. 114 : 5 Bom. L.R. 421: 7 Calcutta W.N. 441 .. 522
Motilal v. Karrabul-Din, (1897) 24 Ind. App. 170 : I.L.R. 25 Cal. 179 : 1 Cal. W.N. 639 .. 149
Mowall v. Palmouth Boat Construction Co., Ltd., (1951) A.C. 837 .. 447
Mst. Rukhmabai v. Lala Laxminarayan, (1960) 2 S.C.R. 253 : 1960 S.C.J. 433 : A.I.R. 1960 S.C. 335 .. 66, 253, 257
Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493 .. 395
Muthu Veeram Chetty v. Govindan Chetty, (1961) 2 M.L.J. 470 : I.L.R. (1961) Mad. 908 : 74 L.W. 422 : A.I.R. 1961 Mad. 518 .. 73

N

Nachimuthu Chettiar v. Moorthammal, (1976) T.L.N.J. 367 .. 76
Nagama Naicker v. Ponnuchinnayyan, (1970) 1 M.L.J. 437 .. 397
Nagarathnammal v. Ibrahim, (1955) 2 M.L.J. 49 : 68 L.W. 206 : I.L.R. (1955) Mad. 460 : A.I.R. 1955 Mad. 305 (F.B.). .. 238
Nagayasami Naidu v. Kochadai Naidu, (1970) 1 M. L.J. 105 : 81 L.W. 436: I.L.R. (1969) 1 Mad. 459 : A.I.R. 1969 Mad. 329 .. 309
Nageswara Rao v. Ramachandra Rao, (1972) 2 A.P.L.J. 397 : (1973) 2 An. W.R. 36 : (1973) 1 An. L.T. 128 : A.I.R 1973 A.P. 86 .. 391
Nagindas v Dalpatram, (1974) 2 S.C.J. 21 : A.I.R. 1974 S.C. 471 .. 86, 90
Naina Pillai v. Daivanai Ammal, 43 L.W. 302 : A.I.R. 1936 Mad. 177 .. 65
Nainamul v. B. Subba Rao, (1957) 2 An. W.R. 53 : A.I.R. 1957 A.P. 546 .. 55, 56
Nakkuda Ali v. M.F. De. S. Jayaratne, (1951) A.C. 66 .. 561
Nalam Hamayya v. Nalam Achamma, I.L.R. (1945) Mad. 160 : (1944) 2 M.L.J. 164 : 57 L.W. 472 : A.I.R. 1944 Mad. 550 .. 256
V. M. Namboothiri v. K.K. Kuruvilla, A.I.R. 1957 Ker. 103 .. 463
Nanni Bai v. Gita Bai, 1958 S.C.J. 925 : 1959 S.C.R. 479 : A.I.R. 1958 S.C. 706 .. 253
Narayan v. Bhau Rao, A.I.R. 1956 Nag. 124 .. 204
Narayan Balwant v. Shankar Waman, A.I.R. 1938 Bom. 215 .. 390
Narayana Raju v. Chamaraju, (1968) 2 S.C.J. 749 : (1968) 3 S.C.R. 464 : A.I.R. 1968 S.C. 1276 .. 65
Narayanan v. Annamalai, 1959 S.C.J. 788 : (1959) 2 M.L.J. (S.C.) 55: (1959) 2 An. W.R. (S.C.) 55 : A.I.R. 1959 S.C. 275 .. 145, 146
Narinderjit Singh v. State of U.P., (1973) 1 S.C.C. 157 : (1973) 2 S.C.J. 378 : A.I.R. 1973 S.C. 552 120, 450, 451
Nataraja Achari v. Balasubramaniam, (1967) 2 M.L.J. 492 .. 360
National Coal Company Ltd. v. L.P. Dave, A.I.R. 1956 Patna 294 .. 434
Nilkant v. Suresh Chandra, (1885) 12 Ind. App. 171 : I.L.R. 12 Cal. 414 .. 149
Nilkantha v. Kashinath, A.I.R. 1962 S.C. 666 .. 174
Nirmala Bala Ghose v. Balachand Ghose, (1966) 2 S.C.J. 426 : (1965) 3 S.C.R. 550 : A.I.R. 1965 S.C. 1874 .. 502

PAGES.

O

Official Assignee, Madras v. Narasimha Mudaliar, (1929) I.L.R. 52 Mad. 717 : 30 L.W. 159 : 57 M.L.J. 145 : A.I.R. 1929 Mad. 705 (F.B.) .. 319
Official Liquidator v. Commissioner of Police, (1969) I.L.R. 2. Mad. 559 .. 347, 349

P

Pacnamal Narayana Shenoy v. Basthi Venkatesh Shenoy, (1970) 1 S.C.W.R. 406 .. 527
Palaniappa Chettiar v. Vairavan Chettiar, (1960) 1 M.L.J. 29 (S.N.) .. 1, 18
Panchayat Union Council v. Muttom, I.L.R. (1970) 2 Mad. 537 .. 25
S.D.G. Pandara Sannidhi v. State of Madras, (1965) 2 S.C.J. 711 : (1965) 2 An. W.R. (S.C.) 167 : (1965) 2 M.L.J. (S.C.) 167 : (1965) 3 S.C.R. 17 : A.I.R. 1965 S.C. 1578 .. 554
Pannalal v. Rajaram, (1926) 96 I.C. 973 .. 278, 279
Parasram v. Dayaldas, A.I.R. 1965 Him. Pra. 32 .. 463
Parmeshri Das v. Fakiria, (1921) 60 I.C. 772 .. 70
Parthasarathi Pillai v. Thiru Vengada, (1907) I.L.R. 30 Mad. 340 : 17 M.L.J. 379 .. 302
Patel Gordhandas Hargovindas v. The Municipal Commissioner, (1965) 1 S.C.J. 15 : (1964) 2 S.C.R. 608 : A.I.R. 1963 S.C. 1742 .. 98
P.S. Pattabiraman v. Ganapathy, (1962) 1 M.L.J. 246 : A.I.R. 1962 Mad. 202 .. 343
Pearlberg v. Varty, (1972) 1 W.L.R. 534 .. 243
Penchey Property Corporation v. Rabinson, (1966) 2 All E.R. 981 .. 87
Periakaruppan v. Madurai Kajimartheru Pallivasal, (1937) M.W.N. 533 .. 215, 216
Periathambi Mudaliar v. Special Tahsildar (LA.), Planning Scheme, I.L.R. (1965) 2 Mad. 416 : A.I.R. 1965 Mad. 328 .. 120
Philippart v. William Whitley Ltd., (Diabolo case), (1908) 2 Ch. 274 .. 420, 421
Polepeddi Krishnamoorthy v. Polepeddi Ramayya, (1927) I.L.R. 50 Mad. 63 : 51 M.L.J. 79 : A.I.R. 1926 Mad. 875 .. 189
Pooma Chand v. Motilal, A.I.R. 1964 S.C. 461 .. 540
Province of Bombay v. Khusaldas S. Advani, 1950 S.C.J. 451 : (1950) 2 M.L.J. 703 : 1950 S.C.R. 621 : A.I.R. 1950 S.C. 222 .. 558, 560
Pugalumperumal Pillai v. Thangathammal, (1949) 62 L.W. 260 : (1949) 1 M.L.J. 389 : A.I.R. 1949 Mad. 690 .. 474

R

Radhamadhub Holder v. Manohar, (1887) 15 Ind. App. 97 : I.L.R. 15 Cal. 756 .. 148
Radheshyam v. State of Madhya Pradesh, (1959) S.C.J. 6 : (1959) S.C.R. 144 : (1959) 1 An. W.R. (S.C.) 5 : (1959) 1 M.L.J. (S.C.) 5 : A.I.R. 1959 S.C. 107 .. 558
Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, 1952 S.C.J. 655 : (1953) 1 M.L.J. 108 : 1953 S.C.R. 232 : A.I.R. 1953 S.C. 7 .. 501
Raja Dhruya Dey Chand v. Harmohibinder Singh, (1968) 3 S.C.R. 339 : (1969) 1 S.C.J. 920 : A.I.R. 1968 S.C. 1024 .. 428
Rajagopalachariar v. State of Madras, (1959) 2 M.L.J. 344 : 72 L.W. 536 : I.L.R. (1959) Mad. 1073 : A.I.R. 1960 Mad. 543 .. 547
Rajalakshmi Dasee v. Katyayani Dasee, I.L.R. (1911) 38 Cal. 639. .. 434
Rajammal v. The Chief Judge of Court of Small Causes (1949) 2 M.L.J. 555 : 62 L.W. 750 : A.I.R. 1950 Mad. 185 .. 183
Rajeshwar Pd v. Ambika Pd., A.I.R. 1956 at. 28 .. 177
Rajiah v. Inspector Municipal Councils and Local Boards, (1955) 2 M.L.J. 116 : 68 L.W. 419 : A.I.R. 1955 Mad. 584 .. 557
Raju Bai Mohambai v. Lal Bai Mulchand, A.I.R. 1926 Bom. 545 (1) .. 389
P.V. Raju Chettiar v. The State of Tamil Nadu, (1970) All India R.C.J. 440 .. 360
Ram Chander v. Jamna Shankar, A.I.R. 1962 Raj. 12 .. 177
Ramkishore Lal v. Kamal Narain, (1963) 2 S.C.R. (Supp.) 417 : A.I.R. 1963 S.C. 890 .. 475
Ram Kishore Sen v. Union of India, (1966) 1 S.C.R. 430 : A.I.R. 1966 S.C. 644 .. 33
Ram Purnima Debi v. Kumar Khagendra Narayan, (1962) 1 S.C.J. 725 : (1962) 2 An.W.R. (S.C.) 27 : (1962) 2 M.L.J. (S.C.) 27 : (1962) 3 S.C.R. 195 : A.I.R. 1962 S.C. 567. 466
Ram Rattan v. Parma Nand, (1946) 1 M.L.J. 295 : 73 I.A. 28 : 59 L.W. 196 : A.I.R. 1946 P.C. 51. .. 256
Rmachandra Bahadur v. Reazuddin, (1884) I.L.R. 10 Cal. 856 .. 135
Ramachandra Rao v. Krishnaswami Iyengar, (1976) 1 M.L.J. 267. ... 527
Ramachandra Shenoy v. Mrs. Hilda Brite, (1964) 2 S.C.R. 722 : A.I.R. 1964 S.C. 1323 ... 476

PAGES.

M.D. Ramakrishnan *v.* Tamil Nadu Electricity Board, (1971) 1 L.L.J. 433. .. 369
Ramalinga Padayachi *v.* Natesa Padayachi, (1967) 2 M.L.J. 166: I.L.R.(1967) 1 Mad. 95: 80 L.W. 643 : A.I.R. 1967 Mad. 461. .. 209
Ramanatha Iyer *v.* Bathul Bai, (1971) 2 M.L.J. 383. .. 528
N. Ramanatha Pillai *v.* The State of Kerala, (1973) 2 S.C.C. 650 : A.I.R. 1973 S.C. 2641 521
S.R.M.A.R. Ramanathan Chettiar *v.* Annamalai Chettiar, 34 L.W. 654 : 61 M.L.J. 704 : A.I.R. 1931 Mad. 825. .. 41
Ramanathan Cherriar *v.* Ramanathan Chettiar, (1960) 1 M.L.J. 1 : 73 L.W. 1 : I.L.R. (1960) Mad. 97 : A.I.R. 1960 Mad. 207. .. 143, 145
Ramanuja Ayyangar *v.* Sadagopa Ayyangar, (1905) I.L.R. 28 Mad. 205 : 15 M.L.J. 249 .. 72
Ramaswami Chettiar *v.* Muthialuswami Chettiar, A.I.R. 1928 Mad. 903. .. 156
Ramaswami Pillai *v.* Karmega Thevar, I.L.R. (1964) 1 Mad. 712 : (1964) 2 M.L.J. 89 .. 360
Ramayammal *v.* Muthammal, (1974) 2 M.L.J. 34 : 87 L.W. 407 : A.I.R. 1975 Mad. 321 .. 449
Ramayya *v.* Kolanda, I.L.R. (1940) Mad. 322 : (1939) 2 M.L.J. 639 :50 L.W. 529 : A.I.R. 1939 Mad. 911. .. 309
P. Ranganathan *v.* Sankarlal Davey, (1949) 2 M.L.J. 597 : A.I.R. 1950 Mad. 139. .. 538
Rangasayi *v.* Nagarathnamma, (1934) I.L.R. 57 Mad. 95 : 38 L.W. 676 : 65 M.L.J. 630 : A.I.R. 1933 Mad. 890 (F.B.) .. 404
Rangaswamy Koundar *v.* Ramaswamy Koundar, (1971) 84 L.W. 25 : A.I.R. 1971 Mad. 328.. 343
M. Ratchanganadan *v.* M/s. Kishindas Shamdass, (1966) 2 M.L.J. 548 : 79 L.W. 617 : A.I.R. 1967 Mad. 279 .. 155
Ratnam Chettiar *v.* S.N. Kuppuswami, (1976) 1 S.C.C. 214 : (1976) 1 S.C.R. 863 : A.I.R. 1976 S.C. 1 .. 403
Rattan Singh *v.* State, A.I.R. 1976 P & H. 279 .. 451
Rowlance *v.* Crevdon Corporation, (1952) 2 Q.B. 803 .. 436
Reg *v.* Governor of Brixton Prison, *ex parte* Abman, (1968) A.C. 192 .. 92
Regional Provident Fund Commissioner *v.* Shree Krishna Megal Munufacturing Company, (1962) 1. L.L.J. 427 : A.I.R. 1962 S.C. 1536 .. 369
The Registrar, University of Madras *v.* Soundra Pandiyan, (1956) 1 M.L.J. 25 : I.L.R. (1956) Mad. 402 : 69 L.W. 196 : A.I.R. 1956 Mad. 309 .. 444, 445
Rev. Br. A. Thomas *v.* Deputy Director of Schools, (1975) 1 M.L.J. 353: 88 L.W. 791 : A.I.R. 1976 Mad. 214 .. 414,415,416
Reversion Fund and Insurance Company Limited *v.* Maison Cosway Limited,(1912) 1 K.B. 364. .. 40
Ridge *v.* Baldwin, (1964) A.C. 40 : (1963) 2 All E.R. 66 .. 560, 561
Robertson *v.* Minister of Pensions, (1947) 1 K.B. 227 .. 447
H.L. Rodhey *v.* Delhi Administration, A.I.R. 1969 Delhi 246 .. 30
Rolls Sewer Limited *v.* Cox, (1967) 1 A.E.R. 397 : (1967) 1 Q.B.D. 522 : (1967) 2 W.L.R. 241 .. 324
Rose *v.* Hart, 129 E.R. 477 .. 323, 324
Roshan Lal *v.* Dhuri Singh, A.I.R. 1922 All. 479 .. 169
Roshan Lal *v.* Firm Bridhi Chand, A.I.R. 1924 Pat. 603 .. 177
Rt. Rev. M.S. G R. Mark Netto *v.* Government of Kerala, 1976 K.L.T. 312 : A.I.R. 1977 Ker. 58 .. 415, 417
Rudrappa Chetty *v.* Narasimha Chetty, (1965) 78 L.W. 524 : (1965) 2 M.L.J. 160 : A.I.R. 1965 Mad. 495 .. 343
Rue *v.* Rue, (1962) A.C. 496 .. 181
Runchordas Vandravandas *v.* Parbati Bai, (1899) L.R. 26 I.A. 71 : 1 Bom. L.R. 607: I.L.R. 23 Bom. 725 .. 302

S

Sahebzada Mohd. Kamgar Shah *v.* Jagdish Chandra Deo, (1960) 3 S.C.R. 604 : A.I.R. 1960 S.C. 953 .. 475
Sakkubai Ammal *v.* Babu Reddiar, (1977) 90 L.W. 110 .. 322
Samarendra Nath Singh *v.* Krishna Kumar Nag, (1967) 2 S.C.R. 18 : (1968) 1 S.C.J. 68 : A.I.R. 1967 S.C. 1440 .. 148
Sampathkumari *v.* Lakshmiammal, I.L.R. (1962) Mad. 832 : 75 L.W. 639 : (1962) 2 M.L.J. 464 : A.I.R. 1963 Mad. 50 .. 395
Santhakumari *v.* Narasingha Mudaliar, (1976) 2 M.L.J. 211 .. 527
Santosh Kumar *v.* Bhai Mool Singh, 1958 S.C.J. 434 : (1958) 1 M.L.J. (S.C.) 159 : (1958) 1 An. W.R. (S.C.) 159 : 1958 S.C.R. 1211 : A.I.R. 1958 S.C. 321 .. 41, 42
Saremal Puramchand *v.* Kapurchand Puramchand, (1924) I.L.R. 48 Bom, 176 .. 40
Sarin *v.* Paplai, (1966) 1 S.C.J. 199 : (1966) 1 S.C.R. 349 : A.I.R. 1966 S.C. 432 .. 474

PAGES

Sathaluru Seetharamanujacharyulu *v.* Narra Venkatasubbamma, (1930) 59 M.L.J. 485 : I.L.R. 54 Mad. 132 : A.I.R. 1930 Mad. 824 .. 148
Satyabrata Ghose *v.* Mugneeram Bangur and Company, 1954 S.C.R. 310: (1954) 1 M.L.J. 41 : 1954 S.C.J. 1: A.I.R. 1954 S.C. 44 .. 428
Satyadhyan Ghosal *v.* Smt. Deoraj, in Debi, (1960) 3 S.C.R. 590 : A.I.R. 1960 S.C. 941 .. 71
Secretary of State *v.* Dugappa Bhandary, 95 I.C. 789 : A.I.R. 1926 Mad. 921 .. 215
Seethalakshmi Ammal *v.* Rajammal ,(1965) 1 M.L.J. 287 .. 12
Selvaraj *v.* Narasimha Rao, (1969) 1 M.L.J. 587 .. 315, 526, 527
Seshayya Garu *v.* Rajah of Bittapur, (1916) 31 M.L.J. 219 .. 132
Seth Nanak Chand Shadiram *v.* Amin Chand Payarilal, A.I.R. 1970 Cal. 8 .. 71
Sha Manakchand *v.* Sankarji Moolchand, (1965) 2 M.L.J. 12 .. 525
Shamsher Singh *v.* State of Punjab, (1975) 1 S.C.R. 814 :A.I.R. 1974 S.C. 2192 .. 31, 33
S. Shanmugham Pillai *v.* K.Shanmugham Pillai, (1973) 2 S.C.C. 312 : A.I.R. 1972 S.C. 2069. 502
Sharp *v.* Wakefield, (1891) A.C. 172 .. 562
Sheopati Kuer *v.* Ramakant Dikshit, A.I.R. 1947 Pat. 434 .. 411
S.K. Singh *v.* V.V. Giri, (1970) 2 S.C.J. 768: A.I.R. 1970 S.C. 2097 .. 30
Smt. Kiranmoyee Dassi *v.* Dr. J. Chatterjee, (1945) 49 Cal. W.N. 246 .. 27, 39
Smt.C.B.Purshothamadass *v.* P. Mittalal, (1976) 1 M.L.J. 89 : 89 L.W. 75 : A.I.R. 1976 Mad. 65 .. 526
R.M. Solai Nadar *v.* M/s. A.T.A.V. Guruswami Nadar and Company, 1969 All.India R.C.J. 767 .. 360
V. Somasundara Mudaliar *v.* The Madras Provincial Co-operative Society Ltd., (1950) 1 M.L.J. 655 : 63 L.W. 610 : A.I.R. 1950 Mad. 711 .. 538
Somasundaram Pillai *v.* Provincial Government of Madras, I.L.R. (1947) Mad. 837 : (1947) 1 M.L.J. 123 : 60 L.W. 110 : A.I.R. 1947 Mad. 366 .. 377
Somawanti *v.* State of Punjab, (1963) 2 S.C.J. 35 : A.I.R. 1963 S.C. 151 .. 22
Someswaraswamy Varu *v.* Srirajitam, (1971) 1 An. W.R. 14 .. 549
Soundaram *v.* Entertainment Tax Officer, (1969) 2 M.L.J. 6 .. 286
Sri Vedagiri Lakshmi Narasimha Swami Temple *v.* I. Pattabhirami Reddi, (1967) 1 S.C.R. 280 : A.I.R. 1967 S.C. 781 .. 109
St. Xavier's College *v.* State of Gujarat, (1974) 2 S.C.J. 381 : (1975) 1 S.C.R. 173: A.I.R. 1974 S.C. 1389 .. 414, 416
State *v.* Bhagat Ram, A.I.R. 1970 P & H. 9 .. 557
State of Andhra Pradesh *v.* Vauhini Pictures (P.) Ltd., (1962) 13 S.T.C. 847 .. 481, 485
State of Gujarat *v.* Ambalal, (1976) 3 S.C.C. 495 : A.I.R. 1976 S.C. 2002 .. 242
State of Madhya Pradesh *v.* Thakur Bharat Singh, (1968) 1 S.C.J. 173 : (1968) M.L.J. (Crl.) 24 ; (1967) 2 S.C.R 454 : A.I.R. 1967 S.C. 1170 .. 112
State of Madras *v.* Ramaswami, (1970) 83 L.W. 621. .. 271
State of Madras *v.* Srinivasa Iyengar, (1970) 2 M.L.J. 628 .. 270
State of Madras *v.* Tirunelveli Municipal Council, (1967) 1 M.L.J. 47 .. 559
State of Mysore *v.* Abdul Rasak, (1973) 3 S.C.C. 196 : (1974) 1 S.C.J. 492 : A.I.R. 1973 S.C. 2361 .. 450, 451
State of Mysore *v.* V.K. Kangan, (1976) 2 S.C.C. 895: (1976) 1 S.C.R. 369: A.I.R. 1975 S.C. 2190 .. 22, 230, 234
State of Orissa *v.* Binapani Dei, (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 625 : A.I.R. 1967 S.C. 1269 .. 561
State of Tamil Nadu *v.* Burmah Shell Company Limited, (1973) 3 S.C.C. 511 : (1973) 31 S.T.C. 426 : A.I.R. 1973 S.C. 1045 .. 45
Subba Narayana Vathiyar *v.* Ramaswami Aiyar, (1907) I.L.R. 30 Mad. 88 : 16 M.L.J. 508 .. 72
Subba Rao *v.* Lakshman Rao, 23 L.W. 609 : I.L.R. 49 Mad. 820 : A.I.R. 1926 Mad. 728 (F.B.) .. 390
Subba Reddiah *v.* Seetharaman, (1972) 1 M.L.J. 497 : A.I.R. 1972 Mad. 421 .. 136
Subbaraya Chettiar *v.* Abirami Ammal, I.L.R. (1964) 2 Mad. 720 : 77 L.W. 524: A.I.R. 1965 Mad. 157 .. 72
C.V.Subbayya *v.* P. Anjayya, (1974) 1 M.L.J. 58 (S.C.): (1974) 1 S.C.J. 130 : (1974) 1 An.W.R. (S.C.) 58 : (1972) 3 S.C.R. 172 : A.I.R. 1972 S.C. 1421 .. 548
P.V.Subbayyan Chettiar *v.* Rajaram, (1958) 1 M.L.J. 335 : 1958 L.W. 124 .. 475
Subbu Naidu *v.* Varadarajulu Naidu, (1947) 1 M.L.J. 90 : 60 L.W. 135 : I.L.R. (1947) Mad. 694 : A.I.R. 1948 Mad. 26 .. 254
C.L.Subramaniam *v.* The Collector of Customs, (1972) 3 S.C.R. 485 : (1973) 2 S.C.J. 488 : A.I.R. 1972 S.C. 2178. ... 15

UNIVERSITY ... CUTTA
NOT TO BE REMOVED
DEPARTMENT OF LAW

	Pages.
Sundaram Chettiar v. Valliammal, (1935) I.L.R. 58 Mad. 116 : 65 M.L.J. 16 ..	41
Sundararajulu Nadar v. Kuppammal, 1936 Mad. W.N. 472. ..	337
Sundaravaradan *v.* Official Liquidator, T.N.B. Subsidiary, (1939) M.W.N. 1231 : A.I.R. 1940 Mad. 266 ..	323
Swadeshi Cotton Mills Company Ltd. *v.* State Industrial Tribunal, (1962) 1 S.C.R. 422 : A.I.R. 1961 S.C. 1381 ..	556
T	
Tea Financing Syndicate Limited *v.* Chandrakamal, (1931) I.L.R. 58 Cal. 649 : A.I.R. 1931 Cal. 359 ..	334
Thakar Das *v.* Sant Ram, A.I.R. 1949 East. Punj. 219 ..	70
Thalai Vadivu Anandar *v.* Venugopala Chettiar, (1960) 1 M.L.J. 356 : 1960 M.W.N. 685 ..	47, 48, 49
Thambuswami Reddiar *v.* Chidambara Pillai, (1954) 2 M.L.J. 322 : 67 L.W. 1139 : A.I.R. 1954 Mad. 960 ..	343
Thammineni Paparao *v.* Dhavala Polinaidu, (1945) 1 M.L.J. 323 : 58 L.W. 121 : A.I.R. 1945 Mad. 205. ..	212
Thirugnanasambandham Pillai *v.* Ramachandram Pillai, (1953) 1 M.L.J. 496 : A.I.R. 1953 Mad. 744 ..	108
Thiruvengadaswami Iyengar *v.* Commissioner, Hindu Religions and Charitable Endowments, (1958) 1 M.L.J. 285 : I.L.R. (1958) Mad. 662 : (1958) L.W. 181 ..	299
Thomas *v.* Thomas, (1842) 2 Q.B. 851 ..	379
Thulasi Ammal *v.* Gowri Ammal, (1964) 1 M.L.J. 228 : I.L.R. (1964) 1 Mad. 65 : 76 L.W. 505 : A.I.R. 1964 Mad. 118. ..	448, 449
Tirumalai Tirupati Devasthanams Committee *v.* Krishnayya, (1942) 2 M.L.J. 785 : I.L.R. 1943 Mad. 8 : A.I.R. 1943 Mad. 146 ..	108
Trichinopoly Varthaga Sangam Ltd. *v.* T. N. Shanmugasundaram, I.L.R. (1939) Mad. 954 : (1939) 2 M.L.J. 345 : A.I.R. 1939 Mad. 769 ..	474
U	
Uma Shankar Misra *v.* Board of High School and Intermediate Education, A.I.R. 1974 All. 290 ..	520
Union of India *v.* Anglo-Afghan Agencies, (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366 : A.I.R. 1968 S.C. 718 ..	447, 561
Union of India *v.* Joseph, (1973) 2 S.C.R. 752 : (1974) 2 S.C.J. 276 : A.I.R. 1973 S.C. 303 ..	240
Union of India *v.* Sripathi Ranjan Biswas, (1976) 1 S.C.J. 522 : (1975) 4 S.C.C. 699 : (1976) 1 S.C.R. 268 : A.I.R. 1975 S.C. 1955 ..	31, 34
University of Delhi *v.* Ashok Kumar Chopra, A.I.R. 1968 Del. 131 ..	445
Uthaman Chettiar *v.* Thiagaraja Pillai, (1955) 68 L.W. 810 : A.I.R. 1956 Mad. 155 ..	343
V	
Vasudev Rao *v.* C.K. Rangai Gounder, (1951) 1 M.L.J. 588 : 64 L.W. 574 : A.I.R. 1952 Mad. 650 ..	305
Vaikunta Bhakta *v.* Kunni Pakki Beari, (1909) 19 M.L.J. 288 ..	187
Varada Pillai *v.* Jeevarathnammal, (1920) I.L.R. 43 Mad. 244 : 46 I.A. 285 : 38 M.L.J. 313 : A.I.R. 1919 P.C. 44 ..	252
Varadaraja Gounder *v.* State of Tamil Nadu, (1973) 86 L.W. 709 : (1973) 1 M.L.J. 408 : A.I.R. 1973 Mad. 278 ..	120
Veeraraghavasami *v.* Mancamma, (1939) 2 M.L.J. 812 : 50 L.W. 917 : A.I.R. 1940 Mad. 90 ..	73
Velu Pillai *v.* Ghouse Mahomed, (1894) I.L.R. 17 Mad. 293 : 4 M.L.J. 140 ..	334
Velusami *v.* Velusami Konar, (1961) 2 M.L.J. 20 : A.I.R. 1962 Mad. 153. ..	254
R. Venkata Subbu *v.* The Director of Endorsement, (1969) 1 M.L.J. 281 ..	522
Venkata Varaha Dikshitar *v.* Subbaraya Pillai, (1911) 1 M.W.N. 95 : 20 M.L.J. 306. ..	389
H. Venkatachala Iyengar *v.* B.N. Thimmajammal, (1959) 1 S.C.R. (Supp.) 426 : A.I.R. 1959 S.C. 443 ..	465, 466
N.M. Venkatarama Iyer *v.* The Collector of Tanjore, (1931) 60 M.L.J. 410 : I.L.R. 53 Mad. 921 : 32 L.W. 363 : A.I.R. 1930 Mad. 836 ..	269
Venkatarama Iyer *v.* Government of Madras, (1967) 80 L.W. 613 ..	438, 439
Venkatarama Reddiar *v.* Valli Akkal, 4 L.W. 15 : 68 M.L.J. 81 : I.L.R. 58 Mad. 693 : A.I.R. 1935 Mad. 181 (F.B.) ..	73

PAGES.

Venkataraman v. Yanamandra Satyavati, (1924) 46 M.L.J. 383 : A.I.R. 1924 Mad. 578 .. 411

Venkatasubbayya v. Viryya, 1956 An.W.R. 1082 : I.L.R. (1956) A.P. 1076 : A.I.R. 1957 A.P. 981 .. 137

W

Wisemann v. Borneman, (1971) A.C. 297 .. 243

Y

Yakub Ebrahim Sayani v. Bai Rahimathai, (1908) 10 Bom. L.R. 346. .. 70

Yasodammal v. Janaki Ammal, (1968) 1 M.L.J. 249 : 81 L.W. 2 : I.L.R. (1968) 2 Mad. 382 : A.I.R: 1968 Mad. 294. .. 255

Yesu Vadian v. Subba Naicker, (1919) 52 Ind. Cas. 704 : A.I.R. 1919 Mad 132. .. 337

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GENERAL INDEX

[SUPREME COURT]

MADRAS GENERAL SALES TAX ACT (I OF 1959), Second schedule, Items 7 (a) and 7 (b)—Constitutional validity—Constitution of India (1950), Art. 304 (a)—Scope .. 1

MOTOR VEHICLES ACT (IV OF 1939), S. 47—State carriage permit—Grant of —Criteria .. 7

PENAL CODE (XLV OF 1860), S. 302—Criminal Procedure Code (II of 1974), S. 357 (1) (c)—Murder — Sentence of life imprisonment combined with heavy fine — Fine imposed to enable heirs of deceased to obtain compensation under S. 357 (1) (c)—Propriety and legality of ... 13

STAMP ACT (II OF 1899), Ss. 2 (17), 4 (1) and 40 (b)—Scope—Stamp duty on mortgage—Deed—Principal document, test.. 8

GENERAL INDEX

[HIGH COURT]

ARBITRATION ACT (X OF 1940), S. 14 (2)—Form of notice—Arbitration agreement—One party naming an arbitrator—Failure by other party to name—Arbitrator named becoming sole arbitrator—Notice of date of enquiry given—One of the parties not taking part in the enquiry—Award passed by arbitrator—Notice of award to parties—Petition by arbitrator to Court for reception of award—Notice sent by Court to the parties—Service of notice on representative of the party—Service of notice whether proper and valid — Aggrieved party not taking any action—Decree in terms of award—Execution of the decree—Petition to set aside the **ex parte** decree — Maintainability .. 171

———S. 34—Suit for accounts—Application under S. 34 for stay of suit by the defendants—Stay granted by trial Court—Failure of defendants to pursue arbitration proceedings—Trial of suit taken up after giving defendants time for filing written statement—Objections by defendants that stay had not been vacated — Objections overruled—Decree passed—Scope of Court's powers under S. 34 — Discretion of trial Court—In case of no procedure laid down by statute Courts to eschew procedural technicalities and render justice—Court granting stay can discharge the same without any application before it .. 382

ARMS ACT (LIV OF 1959), Ss. 17 and 18—Petitioner, holder of a gun licence—Cancellation of licence for alleged involvement in a number of hurt cases—Details of offences and specific charges not furnished to petitioner — Principles of natural justice violated—Order cancelling licence liable to be quashed .. 7

BANKING COMPANIES (ACQUISITION AND TRANSFER OF UNDERTAKINGS) ACT (V OF 1970), S. 3 — Central Bank of India, if came to be formed in pursuance of a special Indian law .. 312

CENTRAL CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, 1965—Assistant Cashier—In-charge of Cumulative Time Deposit Scheme—Irregularities and shortages — Charges framed—Enquiry under R. 14—Request by petitioner to engage legal practitioner to defend him, at the enquiry—Refusal of request—Petitioner not taking part in the enquiry—Petitioner found guilty of the charges—Dismissal from service—Appeal by petitioner dismissed—Validity of the dismissal order and the Appellate order challenged—Reasonable opportunity held not given to petitioner to defend himself—Writ of **certiorari** issued—Constitution of India (1950), Art. 226. .. 13

CIVIL PROCEDURE CODE (V OF 1908), S. 11—Suit for partition—Plaintiff party in another suit decided earlier—Issue not raised in earlier suit raised in the later suit—Plea of **res judicata** raised by defendants—Matter ought to have been considered in the earlier suit and deemed to have been a matter directly and substantially in issue in that suit — Decision in the earlier suit held to operate as **res judicata** .. 125

———Section 47 .. 74

———S. 92—Scope and applicability—Infringement of private rights outside scope of enquiry under the section — Public trust for running and maintaining a Higher Elementary School—Allegations of mismanagement against the trustee — Advocate-General's sanction obtained by plaintiff—One of the plaintiff's widow of a relation of the founder and the other old boy of the school and resident of the locality—Action against trustee maintainable .. 261

———S. 92—Trust—Idol of Sri Ramachandramoorthi installed in a village — Trust created by a deed of endowment and provision made for management of the Trust—Death of founder—Subsequent trustee alienating trust property and purchasing building in another village and removing the picture of 'Sri Ramachandramoorthi' to the new place—Plaintiff, grandson of the founder, challenging the alienation—Suit maintainable—Alienation not binding on the trust .. 452

———S. 92 (1) .. 103

———S. 115 — Presidency Small Cause Courts Act (V of 1882), S. 41 — Ejectment suits—Eviction ordered—G.O. Ms. No. 1988, Home Department, dated 12th August, 1974 applicable to the case — Revision against eviction orders—Small Cause Court, whether has jurisdiction—Question raised for the first time before High Court—Permissibility—Held on facts, that the Small Cause Court had jurisdiction .. 432

———S. 142, O. 1, R. 5—Applicability to Arbitration Act .. 171

———O. 1, R. 10 (2)—Suit on promissory note—Assignor-orignal payee of the promissory note, if a proper party .. 342

———O. 1, R. 10 and O. 22, R. 4—Suit against four defendants—Fourth defendant dead even on the date of filing of the suit—Legal representatives could not be added—Suit against a dead person a nullity.. 345

———O. 20, R. 12—Discretion of Court to grant future profits when asked for by the plaintiff at any time before the termination

C.P. CODE (1908)—(Contd.)

of the **lis**—Termination of the **lis** when takes place .. 1

———O. 33, R. 15—Petition of sue **in forma pauperis** — Dismissed for default — Subsequent suit filed and entertained—Scope of O. 33, R. 15—Suit maintainable so far as prior petition was not dismissed on merits ... 187

———O. 34, Rr. 7, 8 and 9—Suit for redemption of usufructuary mortgage—Mortgagee remaining **ex parte** — Suit decreed—Final decree passed straightaway — Procedure whether correct .. 169

———O. 37, R. 2—Promissory note—Suit on—Leave to defend granted subject to condition of deposit—Propriety of order ... 25

———O. 37, R. 3—High Court Original Side Rues, O. 7, R. 6 (1)—Suit on promissory note—Promissory note executed second defendant for and on behalf of first defendant from in which he was a partner — Application for leave to defend by the firm and the other partners—Plea by defendants that the second defendant had no authority to borrow which could bind the firm—Leave refused by Master and the single Judge—Appeal by the firm and the other partners—Leave granted holding that there were triable issue .. 36

———as amended by Central Act (CIV of 1976), O. 21, R. 29—Scope and applicability .. 344

———O. 21, R. 58—Scope and applicability —Enquiry not to be summary — Decision should be as if rendered in a regular suit .. 468

CONSTITUTION OF INDIA (1950), Art. 30—Petitioner-correspondent of High School —Temporary recognition granted to school —Both boys and girls admitted—Exclusive Girls' School 400 yards away—G.O. No. 1664, Education Department dated 19th October, 1972 passed against admission of Girl students in Boys' School when there was separate Girls' School except with approval of inspecting officer—Petitioner's school called upon to obey terms of the G.O.—Government grant withheld—Fundamental right of petitioner, if violated—G.O. whether liable to be struck down—G.O. only regulatory .. 413

———Art. 226 .. 550

———Art. 226—Writ of **mandamus**—Petitioner Graduate Upper Division Clerk in Corporation of Madras—All departmental tests including Accounts and Revenue tests passed—Qualified for post of Assistant Revenue Officer—25 years of service and unblemished record—Not promoted to the post of Assistant Revenue Officer, for non-payment of property tax—Non-payment of property tax no ground for denial of promotion ... 325

CONSTITUTION OF INDIA (1950) — (Contd.)

———Art. 359 (1)—Proclamation of Emergency—Challenge to infraction of positive statutory provision not the same as attempt to enforce fundamental right—Recourse to writ remedy not affected by continuance of Proclamation and Presidential Order .. 109

CONTRACT ACT (IX OF 1872), Ss. 2 (d), 4, 5 and 6—Suit for damages—Auction of collecting fees held by Corporation of Madras—Bidder depositing bid amount — Acceptance of bid not communicated by Corporation for nearly two months—Bidder revoking bid and demanding return of deposit—Acceptance to bid after revocation by bidder whether valid—Bidder whether to keep offer open till acceptance — Handing over of a copy of agreement to be entered into whether amounts to consideration—Revocation held to be properly made and there was no acceptance before revocation—Held there was no consideration and therefore the bidder was not bound to keep the offer open .. 371

———S. 56—Impossibility of performance of contract—Doctrine of frustration — If applicable to licences .. 424

———S. 74—Penalty and liquidated damages distinguished .. 424

CO-OWNERS—Lease by joint owners in favour of one among them—Validity—Suit for arrears of rent—Claim of interest at 12 per cent. per annum—Whether can be allowed—No express or implied contract—Lessor entitled to only 6 per cent. per annum .. 178

CO-OWNERSHIP—Concept .. 505

DEED—Construction .. 296

——— Construction — Partition between father and sons—Earlier clause providing for absolute estate and later clause giving liberty to alienate only one item—Rest of the properties to be taken by male and female heirs after life of the person in whose favour absolute estate was created under the earlier clause—Nature of interest taken —Later clause not repugnant—Life estate held to have been created ... 471

DOCUMENTS — Interpretation — Burden on party alleging coercion and undue influence in executing sale deed to substantiate plea—When recitals in a deed are clear oral evidence not permissible to give contrary in interpretation — Construction of document to be on the language used therein .. 196

EASEMENT—Suit for declaration of easement rights—Common wall — Co-owners—Co-owner cannot claim easement right in respect of common wall .. 386

EMPLOYEES' PROVIDENT FUNDS ACT (XIX OF 1952), S. 2-A — Medical journals—Printing Press and Office situated in different premises — Provisions of the Act extended to the press — Whether Act

EMPLOYEES PROVIDENT FUNDS ACT (1952)—(Contd.)
applies to office also—Press and office held to be one unit .. 365

EVIDENCE ACT (I OF 1872), S. 32 (5)—Government Servant — Suit for declaration of date of birth — Copies of horoscopes relied on — Date of birth as claimed held not proved — Evidentiary value of horoscopes .. 460

———S. 44 — Suit on promissory note — Leave to defend granted on condition of deposit—Condition note fulfilled in time — Decree passed in the presence of defendant —Deposit made within time granted by High Court on revision—Application under O. 37, R. 4, C. P. Code to set aside decree dismissed on 24th September, 1974 — Application under S. 44 of the Evidence Act filed on 26th September, 1974 on the ground that the decree was obtained by fraud — Decree set aside—Revision allowed—Lower Court's jurisdiction lost once the decree became final on dismissal of the application under O. 37, R. 4, C. P. Code .. 5

———Ss. 67, 68 — Indian Succession Act (XXXIX of 1925), S. 63—Suit for partition Some of the defendants claiming succession under a will — Will registered — Genuineness of will challenged by plaintiff—Execution found not proved .. 456

———S. 115 — Equitable estoppel — Appellant B.Sc. Graduate with Honours from Karnataka University — Appointed as a Senior Instructor in Chemistry in Motilal Nehru Polytechnic at Pondicherry — Education Department of Pondicherry Government invited applications for the posts of Assistant Professors and Tutors etc. — Qualification for post of Assistant Professors, a first or second class M.A.|M.Sc. or B.A. (Hons.)|B.Sc. (Hons.) in the subjects concerned — Appellant applied and appointed as Assistant Professor of Chemistry, Tagore Arts College, Pondicherry — Appointment temporary and liable to reversion at any time — Appellant appointed Examiner by University of Madras for certain examinations, including Chemistry examination for the Pre-University and functioned as such — University of Madras finding appellant to be only a B.Sc. Graduate with (Hons.) and not a B Sc , (Hons.) Graduate, held he was not qualified for the post of Assistant Professor — Appellant was issued show cause notice by the Director of Education, Government of Pondicherry—Reply by appellant admitting that he was not qualified for the post of Assistant Professor with request to obtain exemption from the University of Madras for continuing him as Assistant Professor — Reversion of appellant to post of Senior Instructor by the Director of Education, Government of Pondicherry — Reversion whether liable to be quashed — Principle of equitable estoppel, whether available to

EVIDENCE ACT (1872)—(Contd.)
the appellant against the Government.. 517

HINDU LAW — Co-widows—Partition by metes and bounds of properties left by husband — Validity — Co-widow's power to effect final and absolute partition even before the Hindu Women's Rights to Property Act—'Acquired by female Hindu at a partition ......' in S. 14 (1) of Act (XXX of 1956) — Meaning of—Lease of land by one co-widow after partition — Other co-widow executing a gift deed in respect of the land leased in favour of tenant—Would amount to tenant setting up title against the landlady and would forfeit the lease—Hindu Succession Act (XXX of 1956)—Transfer of Property Act (IV of 1882), S. 111 (g).. 391

———Dedication for religious and charitable purposes — Essentials — Complete dedication or charge only—Deed — Construction .. 492

———Joint family — Internal arrangement between coparceners for convenient and separate enjoyment of joint property by members—Member of joint family enjoying certain lands of the joint family, constructing house out of the income from the lands —Should be treated as joint family property .. 305

———Partition — Suit for—Joint family properties — Registered partition between members where minors were represented by mother—Minor becoming major — Suit to set aside earlier partition as unfair and unequal—Suit filed more than three years after attaining majority — Partition made earlier not to be ignored where minor was eo nomine a party—Bar of limitation also operates .. 398

———Suit for partition — Properties claimed as joint family properties — Burden of proof .. 56

———Trust — Dedication of properties — Absolute or partial—Test .. 296

HINDU MARRIAGE ACT (XXV OF 1955), Ss. 5, 11 and 16—Petition for declaration of nullity of marriage—Husband dead at the time of filing petition — Petition whether maintainable .. 448

———Ss. 15 and 16 as amended by the Marriage Laws (Amendment) Act (LXVIII of 1976) — Suit for declaration of title to property—Remarriage within two months of dissolution of first marriage — Children born of remarriage — Remarriage whether legal and children whether entitled to succeed to their father's property — Effect of amendment of Ss. 15 and 16 by the Marriage Laws (Amendment) Act of 1976 .. 49

IMPORTS (CONTROL) ORDER (1955), Cls. 3 (3) and 10-C—Customs Act (LII of 1962), Ss. 131, 111 (d)—Constitution (Forty-second Amendment) Act (1976), S. 58 — Import of photographic films —

IMPORTS (CONTROL) -ORDER (1955)—(Contd.)

Licence issued to appellant — Arrival of goods at Madras port — Licensee selling freezing plant before arrival and after arrival the Printing Press — Confiscation of imported goods by Customs Authorities under S. 111 (d) of the Customs Act read with Cl. 3 (3) of the Import (Control) Order —Validity — Violation of condition in the licence happening after completion of import—Cl. 10-C of Import (Control) Order applicable and not Cl. 3 (3)—Writ Petition dismissed before 1st February, 1977—Writ appeal filed—Whether petition pending on the appointed day—Petition did not include appeal .. 287

INJUNCTION—Suit for — Plaintiffs claiming protection under Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955) —Plaintiffs dispossessed after filing of suit—Petition, to amend prayer for recovery of possession, returned and not represented — Plaintiffs not entitled to injunction — Amendment not allowable at the stage of second appeal by the defendant-purchasers —C. P. Code (V of 1908), O. 6, R. 17 .. 351

LAND ACQUISITION ACT (I OF 1894), S. 4 (1)—Notification published in Official Gazette on 3rd October, 1973—Public notice of substance of notification given by Collector 22 days later in the locality—Procedure illegal—Constitution of India (1950), Art. 226 .. 450

———Ss. 4 (1), 5 (A), 6 and 17 (1), (2) and (4) — Applicability — Notification under S. 4 (1), the direction and the declaration —Simultaneous publication — Proceedings liable to be quashed .. 339

———Ss. 4 (1), 5 (A) and 17—Acquisition of land — Providing house sites for the poor—Notice of substance of notification not given simultaneously with publication in the locality—Effect .. 118

———Ss. 4 (1), 6—Rules of Business of the Government of Pondicherry, 1963, R. 46—General Clauses Act (X of 1897), S. 3 (8), (b) (iii) — Constitution of India (1950), Art. 239—Land Acquisition — Notification followed by declaration by the Pondicherry Government S.R.O. No. 3165, dated 5th November, 1973—Interpretation of — Validity of notification and declaration challenged on the ground that the action was initiated by the Government without obtaining the satisfaction of the Administrator—**Certiorari** issued .. 28

———Ss.4, 5 and 5 (A)—Compulsory acquisition of lands by Government for public purpose—Preliminary notification published in Official Gazette—Display of notification in the locality—Individual notices not served on the persons interested in the land —Land acquisition proceedings not invalid .. 223

LAND ACQUISITION ACT (1894) —(Contd.)

———Ss. 5-A, 6, 7, 39 and 40—Land Acquisition Rules, R. 3 (b)—Constitution of India (1950), Art. 226—Acquisition of land — Formation of road in T.V.S. Nagar — Objections filed under S. 5-A—Acquisition for public purpose to wit, for the formation of a road to T V.S. Co-operative Society Ltd., Madurai—Challenge — Effect of Government making even a token contribution towards contribution — Notice of objection not given to the concerned department—Notice under R. 3 (b) to the concerned department necessary — Proceedings held illegal and struck down—**Certiorari** issued .. 19

———S. 9—Notices under S. 9 (2)—Date of notice cannot be the date of service of notice without proof — Date of service of notice relevant for reckoning the period of 15 days available for preferring objections —Compensation — Lands described as agricultural lands in public records — Lands situate in developed neighbourhood—Valuation to be based on potential value as building site .. 267

———S. 25 — Land belonging to temple acquired by Government — Trustees preferring claim of Rs. 250 per ground—Change in trustees—New trustees making claim for enhanced compensation at the rate of Rs. 1,250 per ground — Reference under S 18 — Claim rejected by civil Court — Appeal by trustees — New trustees held bound by claim made by the old trustees .. 280

———S. 30 — Lands belonging to Temple Kattalai trust — Acquisition for Railways—Award passed and compensation fixed — Reference to civil Court not competent in absence of apportionment of or entitlement to amount .. 532

———Ss. 30 and 31 — Land belonging to temple—Acquisition by Government—Race between hereditary archakas and trustees appointed by Hindu Religious Endowment Administration Department to interest on compensation amount—Trustees not performing '**Samprokshanam**' — Claim of trustees not tenable — Prior proceedings recognising right of archakas — Effect — Operates as **res judicata** .. 362

———S. 45 read with Ss. 9 and 10—Award enquiry — Service of individual notices — Persons having more than one ordinary residence—Service at the ordinary residence of the person good service .. 223

LIMITATION ACT (XXXVI OF 1963), S. 20—Mortgage — **Suit for redemption** of —Mortgage dated 1865 — Acknowledgment of mortgage by one of the mortgagees on 14th October, 1912—Whether saves limitation—Held, in the negative .. 186

———Art. 1—Mutual, open and current account—What is .. 331

MADRAS AGRICULTURISTS RELIEF ACT (IV OF 1938), S. 13—Debts incurred after the commencement of the Act — Re-opening of payments made by a debtor in accordance with contract and appropriated towards interest — If permissible .. 54

MADRAS CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES, R. 16—Petitioner, permanent staff of the Transport Department deputed to Civil Supplies Department — Subsequent transfer to parent department — Borrowing department passing orders for recovery of shortages from petitioner relating to the period of his employment in the borrowing department — Borrowing department had no jurisdiction — **Certiorari** issued — Constitution of India (1950), Art. 226 .. 184

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Schedule IV, R. 19 (1), (2), (3) and (4)—Levy of profession tax — Return of income submitted by assessee — No proper enquiry by executive authority regarding income submitted in the return—No opportunity given to substantiate the statement contained in the return — Levy of profession tax on arbitrary basis of income illegal .. 138

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XXII of 1959), S. 63 — Deputy Commissioner — Enquiry regarding religious or secular character of the endowment — Endowment for support of several temples—Use of the word **'ubayam'** — Specific religious endowment created — Not a private endowment — Religious charity, definition .. 296

——S. 70—Right of suit within 90 days to set aside an order — Period how computed—Filing of copy-application — Effect —Date of the receipt of the order alone relevant .. 296

MADRAS REVENUE BOARDS STANDING ORDERS, B.S.O. 90 G.O. No. 196, Revenue, dated 6th February, 1926—Board of Revenue Regulations (I of 1803) — Powers of Board under the Land Acquisition Act—Superintendence — Extent and nature of .. 223

MADURAI UNIVERSITY ACT (MADRAS ACT XXXIII OF 1965), S. 35 — Madurai University Rules — Student holding ICSE certificate admitted in P.U.C. Class — Admission cancelled after five months on the ground of his having only 35 per cent of marks in ICSE — University directed by High Court to permit the student to sit for the P.U.C. Examination — Candidate passing examination in second class — University not justified in cancelling admission after five months but ought to have exempted him—University directed to declare candidate as having passed P.U.C. examination and also issue a grade certificate—Estoppel doctrine applicable .. 440

MOTOR VEHICLES ACT (IV OF 1939), S. 47 — The Pondicherry Motor Vehicles Rules—Grant of permit — Factors to be considered — Applicant for permit applying for benefit of moratorium law in another proceeding — Whether disqualified for getting permit .. 529

NATURAL JUSTICE PRINCIPLES — Applicability in terpretation of statutes .. 223

NON-MENTION OF THE TERM 'POOR' IN NOTIFICATION NOT INVALIDATING NOTIFICATION — Non-existence of urgency for acquisition — Dispensing with provisions of S. 5-A not justified .. 118

PLEDGE OR HYPOTHECATION — Company borrowing money from two banks on hypothecation of same stocks — Subsequently company ordered to be wound-up—One bank claiming priority of claim on basis of date of hypothecation — Both transactions found to be a fraud on the part of the Managing Director—Sale proceeds of the stocks to be divided **pari passu** between the two banks in proportion to the amount due to each of them .. 346

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), Ss. 7 and 36—Mutual dealings — Claim of set-off—Application by Official Assignee under S. 9—Objection taken at trial stage before Insolvency Judge —Parties cannot be canvassed again at appellate stage .. 316

——Ss. 9 (d) (ii), 9 (g)—Debtors, firm of partners — Branch at Madras—Partner of firm at Madras leaving for Erode—No other partner at Madras—Arrangement made for redirecting communications from Madras to Erode—Notice issued by creditors — Meeting between debtors and creditors 7th and 8th March, 1976 or settlement of debts — Petition by some of the creditors to declare the debtors-firm and partners insolvent under Ss. 9 (d) (ii) and 9 (g) of the Insolvency Act—No act of insolvency held to be committed .. 149

PROMISSORY NOTE — Suit on — Note executed in favour of **R** — Suit filed by **A** and **V** alleging that **R** was their power-of-attorney agent—Suit not maintainable since **A** and **V** were neither payees nor endorsees —Question of law can be raised even later though not raised the written statement .. 67

RAILWAY SERVICES — Determination of seniority — Grain Shop Department — Employees of — Department wound up — Employees absorbed as brakesmen in permanent department — Circular, dated 16th October, 1952 of Railway Board fixing seniority — Petitioners who had lien in **B** grade promoted as **A** grade Guards — Decision of Supreme Court in **General Manager, South Central Railway v. T. Venkata Rao**, A.I.R. 1976 S.C. 678—Petitioners reverted as **B** grade Guards—Order of reversion held bad — Petitioners resorted to **A** grade —

RAILWAY SERVICES—(*Contd.*)

Constitution of India (1950), Art. 226 .. 272

REGISTRATION ACT (XVI OF 1908), Ss. 17 (1) (b) and 49 (c)—Unregistered partition deed—Can be looked into for finding whether there was division in status — Evidence Act, S. 91 — Terms of a document reduced to writing — No oral evidence admissible in proof of terms—Factum of partition can be proved by oral evidence .. 248

——S. 60 (2) — Trust deed executed by N—N's son A alienating trust properties—Alienations challenged by grandson of N — Alienees' plea of trust deed not being properly registered — Deed executed by N on 26th June, 1920 presented for registration by agent on the same date—Registered only on 7th August, 1920—Alienees contending N was not alive on that date — Scope of S. 60 (2)—Burden on party who challenges registration .. 259

STAMP ACT (II OF 1899), S. 2 (10) — Document neither ambiguous nor incomplete — Recitals in the document to be generally a safe guide for interpretation — Document whether release or conveyance (F.B.) .. 327

——S. 35—Deed of partition not stamped —Stamped and validated subsequently — Effect .. 248

SUCCESSION ACT (XXXIX OF 1925), S. 263—Revocation of grant — Principles governing — Revocation to be for a just cause .. 164

——S. 263, **Explanation** — Revocation of earlier grant — When can be made — Allegation of fraud to be specifically pleaded and proved—Just cause — What is — Discretion to be exercised judiciously .. 405

TAMIL NADU AGRICULTURISTS' RELIEF ACT (IV OF 1938) not applicable to loans granted by Bank .. 312

——Ss. 19, 19 (A), 9 (A)—C. P. Code (V of 1908), S. 11—Suit for declaration of nullity of sale and redemption of mortgage as prayed for by Appellate Court—Application under Tamil Nadu Act IV of 1938 for benefits thereunder before the trial Court—Objection by defendants that application should have been filed before Appellate Court—Objection rejected and application allowed giving benefits under the Act IV of 1938 — Validity — Decree obtained by mortgagor for redemption whether a decree for money within the meaning of Act IV of 1938—Scope of S. 19 (A) and S. 9 (A) — S. 19 amended by Act VIII of 1973—Mortgagor whose debt was payable on 24th February, 1973 can take advantage of amendment which came about later — Constructive **res judicata** or estoppel not applicable to the case .. 141

TAMIL NADU BUILDINGS (LEASE AND RENT CONTROL) ACT (XVIII OF 1960), Ss. 2 (2), 14 (1) (b) — 'Building'—Lease of land with masonry structure — Petition for eviction — Contention by tenant that the dominant intention being lease of the land the Rent Controller had no jurisdiction — Petition for demolition and reconstruction — Maintainability not questioned on merit—Bringing in theory of dominant intention not warranted — Existence of a building gave jurisdiction to Rent Controller .. 16

TAMIL NADU BUILDINGS ETC. ACT (*1960*)—(**Contd.**)

——S. 2 (8)—Market — Arrangement for collection of rents under deeds styled as lease deeds executed by Official Trustee in favour of S — Determination of lease and suit for possession by Official Trustee — Claim by S, that Rent Control Act applied and civil suit was barred — Official Trustee whether represented all the interests of the shareholders — Decree in favour of the Official Trustee — Appeal by S—S dying pending appeal — L. Rs of S brought on record—Appeal dismissed—Further appeal by L.Rs.—Law in force on the date when suit or appeal was disposed of applicable—S. 2 (8) as amended by in 1973 would apply—L.Rs. not statutory tenants under the Rent Control Act — Construction of document—Description as lease would not preclude Court from determining real nature of the document — Documents held to merely vest a right to collect rents—Suit for possession competent — Acceptance of rents from L.Rs by Official Trustee would not create fresh tenancy — Official Trustee could represent a small proportion of Trustees — S. 2 (8) declaratory .. 190

——S. 9 (2)—Death of landlord—Tenant petitioner in doubt as to whom he should pay the rent—Petition under S. 9 (2) of the Act and deposit of rent in Court of Rent Controller — Agreement between the claimants to share the deposit — Consequent petition by tenant—Tenant filing an interlocutory application and withdrawing amount deposited without notice to the heirs of the landlord — Interlocutory application under S. 151, C. P. Code to direct tenant to re-deposit amount — Re-deposit ordered by Rent Controller and confirmed by appellate authority — Revision to High Court 10

——S. 10 (3) (a) (iii)—Petition for eviction—Petitioners, owners of building—Petitioners carrying on business in the same building in a portion—Second petitioner carrying on business in some other goods in rented premises—Petition for eviction against tenants on the ground that the building was required for the business of the second petitioner—Petition whether maintainable—Eviction ordered—On appeal eviction order set aside—Revision preferred by landlords—Petition for eviction maintainable under S. 10 (3) (a) (iii) 218

TAMIL NADU BUILDINGS ETC. ACT (1960)—(Contd.)

———as amended by Act (XXIII of 1973), Ss. 10 (2) (i), 10 (2) (ii) (a)—Landlord's petition for eviction of tenant—Allegations of subletting and wilful default—Eviction ordered by Rent Controller — Appellate Authority reversing findings—Revision to High Court—Subletting without consent of landlord—Whether eviction could be ordered .. 536

———S. 10 (3) (a) and (c)—Petition for eviction by landlord—Requirement of landlord for additional accommodation for carrying on business alleged—Petitioner not carrying on any business in any portion of the building—'Carrying on business'—Meaning—Interpretation of Statutes .. 357

———S. 10 (3) (a) and (e) — Scope and applicability—Landlord of a non-residential building—Petition for eviction for personal occupation—Tenant absent on the date of hearing—Eviction ordered—Rent Controller to be satisfied of claim of the landlord as **bona fide**—Rent Controller's impression regarding **bona fide** to be carried out in the order—Order without showing such satisfaction of the Rent Controller is a nullity. 79

———S. 12 (i) (b)—Scope and applicability—Petitioner's building under accommodation control—Petitioner applying to Accommodation Controller for release of the building—Petitioner's requirement of the building for demolition for erecting new building—Petitions dismissed or the ground that the building was in good condition—Condition of building irrelevant—Order liable to be set aside .. 52

———S. 14 (1) (a)—Petition for eviction on the ground of effecting repair—**Bona fides** of the landlord—Tests to be applied .. 314

———S. 14 (1) (b)—Requirement of building by landlord for purpose of demolition and reconstruction—**Bona fide** necessary .. 523

———S. 25 — Powers of the Revisional Authority .. 79

———S. 30—Suit for eviction of tenant decreed—Four months time granted to vacate—Decree put in execution—Act amended—Building in question falling within the purview of Amended Act—Effect—Maintainability of execution petition in the civil Court .. 46

TAMIL NADU CITY MUNICIPAL CORPORATION ACT (IV OF 1919), S. 100 and Rr. 2-B, 3 and 3-A of Sch. IV—Levy of property tax—Adoption of plinth area basis—Not valid—Notices regarding revision of assessment to set out reasons—Fair rent formula contemplated by the Rent Control Act, whether can uniformly be applied .. 93

TAMIL NADU CO-OPERATIVE SOCIETIES ACT (LIII OF 1961), Ss. 65 and 71—Constitution of India (1950), Art. 226—Co-operative Sub-Registrar accused for loss

TAMIL NADU CO-OPERATIVE SOCIETIES ACT (1961)—(Contd.)

—Notice under S. 71 (1) issued—**Explanation** filed not accepted—**Ex parte statements** used against the Sub-Registrar and order of surcharge passed—Validity challenged—Violation of principle of natural justice in not giving petitioner opportunity to cross-examine witnesses—Writ of **certiorari** issued quashing order .. 284

TAMIL NADU DEBT RELIEF ACT (XXXVIII OF 1972), S. 6 — Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (X of 1975), S. 4—Mortgage decree—Judgment-debtor's property brought to sale—Judgment-debtor obtaining benefit as non-agriculturist under Act (XXXVIII of 1972)—Judgment-debtor becoming agriculturist subsequently—Whether can seek benefit under Act (X of 1975) as agriculturist—Estopped from claiming relief .. 74

TAMIL NADU DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 82 (2) and 254—Property tax revision—Annual rental value of building arbitrarily fixed—Assessment not valid .. 121

TAMIL NADU GENERAL SALES TAX ACT (I OF 1959), S. 2 (d)—Dealer in Sea Food Export Import licence given under export promotion scheme—Import of paper and paper boards—Sale of the paper and paper boards whether exigible to tax—Import directly connected with export of sea food—Intention of import was sale — Sale liable to tax .. 43

———S. 13 (5)—Return of goods sold — Claim for refund of tax after six months of sale—Claim rejected—Held correct (F.B.) .. 477

TAMIL NADU HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT (XXII OF 1959)—Charitable purpose—Meaning of — Running hostel for Hindu women—Provisions of the Act whether applicable .. 437

———S. 109—Applicability .. 354

TAMIL NADU MINOR INAMS (ABOLITION AND CONVERSION INTO RYOTWARI) ACT (MADRAS ACT XXX OF 1963)—Object and scope of .. 542

TAMIL NADU PANCHAYATS ACT (XXXV OF 1958), S. 149-A — Scope and applicability—Petitioner, President of Panchayat — Ten charges framed against him regarding serious irregularities—Show cause notice given—Explanation submitted—Meeting of Panchayat—Majority of members voted against removal of President from office—All charges however except one held by Inspector proved and petitioner was removed from office—No reasons given for conclusion—Order of removal liable to be quashed .. 550

———S. 159 and the Rules framed thereunder—Application to Panchayat by second respondent for grant of licence to instal machinery for running a new rice mill —

T.N. PANCHAYATS ACT (1958)—(*Contd.*)

Licence granted by Panchayat—Order challenged by petitioner—Allegation that reports of the Chief Inspector of the Factories and the Director of Town Planning were not called for as required—Expiry of 2 months since date of application, and no orders communicated to respondent—Effect .. 23

TAMIL NADU PROHIBITION ACT (X OF 1937), S. 22—Tamil Nadu Denatured Spirit Methyl Alcohol and Varnish (French Polish) Rules (1959), R. 9 (vii)—Petitioners carrying on business of manufacturing and selling varnish within the territorial limit of Tamil Nadu—Notification by Government—Petitioner called upon to deposit security as per rules—Power to demand security conferred on Collectors only—Rules **ultra vires** of S. 22 of the Act .. 109

TAMIL NADU URBAN LAND TAX ACT (XII OF 1966), S. 20—Fixation of market value—Number of sale deeds produced by assessee—Rejection by Assessing Officer without any basis—Appeal to Tribunal by assessee—Tribunal's failure to consider the documents—Merely adopting the data sale —Disposal not proper and judicial .. 115

TORT—Carrier—Nature of rights and obligations of carrier, different from that of bailee—Contract of carriage — Claim for transport charges by carrier by way of set-off against the insolvent company, if allowable—'Mutuality of dealings', meaning.. 316

TRADE AND MERCHANDISE MARKS ACT (XLIII OF 1958), S. 9 (1) (c) — 'Invented word' — Meaning — 'INSTEA' whether invented word—Affidavits in inquiry regarding registration of trade marks —Value .. 417

TRANSFER OF PROPERTY ACT (IV OF 1882) — Lease and licence — Distinction .. 424

———S. 45 — Property acquired in the name of one of two brothers—Use of common fund earned by the exertions of both brothers—Effect—Just and equitable claim cannot be warded off .. 505

———S. 51—Trespasser on land putting up a construction—Nothing done by the owner to stop it—Acquiescence by owner—Trespasser not liable to be evicted—Owner to be compensated .. 212

———S. 52—Doctrine of **lis pendens** applicable to involuntary sales—'A' the owner of the property creating othi in favour of

TRANSFER OF PROPERTY ACT (1882)—(Contd.)

'B'—Suit by A's Wife C against A for maintenance with charge on property othied—'B' impleaded as party — Suit decreed — Execution of decree for arrears of maintenance—Othied property brought to sale—Purchase by 'C' subject to othi—Subsequent assignment of othi right by B to C—'D' a money decree-holder bringing the very same property to sale — Purchase by D—Delivery of possession effected—Right of C to redeem upheld .. 146

———S. 55 (2), Indian Evidence Act (I of 1872), Ss. 62 and 92—Suit for damages on a contract of indemnity—Sale deed executed by 'A' on behalf of himself and his minor brother 'R' of joint family properties — R on becoming major filing suit against purchaser for partition of his share—Suit compromised by purchaser's wife agreeing to pay Rs. 62,500 in respect of R's share — 'A' one of the defendants in the suit remaining **ex parte** — Purchaser's wife filing suit for damages against 'A' and his sons for the recovery of Rs. 62,500 with interest as due to defect in title—Contention of 'A' that purchaser was aware of the defect even at the time of purchase—Suit dismissed by trial Court .. 196

———S. 91—Tamil Nadu District Municipalities Act (V of 1920), S. 332—Property tax—Liability of landlord paid by tenant as statutory liability—Tenant entitled to reimbursement—Before full reimbursement by adjustment of rent payable, tenant evicted from premises—Suit by tenant for a charge decree in respect of the balance of amount —Tenant entitled to subrogation .. 276

TRUSTS ACT (II OF 1882), Ss. 90, 94 and 95—Quasi-trusts .. 505

WAKF ACT (XXIX OF 1954) — Minor Inam—Suit for possession of properties on foot of properties being wakf properties — Jurisdiction of civil Court to entertain the suits .. 542

———Ss. 15 (1) and 45—Suit by one muttawalli against another for accounts—Notice of suit not given — No allegation of mismanagement or negligence — Suit whether maintainable .. 103

WILL—Executed and registered—Suspicious circumstances alleged—Burden of proof of truth and validity — Effect of registration .. 463

NOTES OF RECENT CASES.

		PAGES.
Bhagyalakshmi Ammal *v.* Somalinga R. Kesavaier, Surviving Trustee, Thirupparankundram Karthikai Somavaram Annadhana Samaradhanai Dharmam	..	7
The Chief Controller, Revenue Authority, Board of Revenue *v.* V. Daniel. (F.B.)	..	5
The Chief Controlling Revenue Authority, Board of Revenue *v.* P.A. Muthukumar (F.B.)	..	2
Chief Controlling Revenue Authority, Board of Revenue *v.* A. Raoof Ali Khan (F.B.)	..	2
S. Jebaperumal *v.* Central Bank of India	..	3
K. Krishnan *v.* Munuswamy	..	6
Meenakshi Aachi *v.* V.K. Kumaraswamy Chettiar		10
A. Mohan Rao *v.* Krishnan	..	9
A. Rajamani *v.* M/s. Shriram Chits and Investments (P) Ltd.	..	7
The Revenue Divisional Officer *v.* A.R. Damodara Mudaliar, Managing Trustee of Pataleswar Devasthanam	..	1
Sethuraman *v.* Muthiah		9

INDEX OF RECENT CASES.

CIVIL PROCEDURE CODE (AMENDMENT) ACT (CIV OF 1976), Ss. 23, 60 and 97 (2) (g) — Attachment effected before the Amending Act—Petition to revise the attachment, on ground of salary liable to attachment being raised to Rs. 400 by the Amending Act—Amendment not effecting attachment already effected .. 7

EVIDENCE ACT (I OF 1872), S. 45—Suit on a promissory note—Endorsement—Showing payment—Genuineness of endorsement disputed—Application for sending the promissory note to Government expert — Proper procedure to be followed .. 10

LAND ACQUISITION ACT (I OF 1894), S. 9—Notices under S. 9 (2)—Date of notice cannot be the date of service of notice without proof—Date of service of notice relevant for reckoning the period of 15 days available for preferring objections—Compensation—Lands described as agricultural lands in public records — Lands situate in developed neighbourhood — Valuation to be based on potential value as building site .. 1

PARTNERSHIP—Four persons carrying on business in partnership — Dissolution of partnership by consent of partners — Accounts settled — Mistake regarding a particular item of account — Suit by one partner against others—Prayer for recovery of a definite sum of money—Suit maintainable—Entire accounts need not be reopened — Surcharging and falsification allowed — Settled accounts liable to be reopened on mutual mistake—Doctrine of unjust enrichment also applicable .. 9

STAMP ACT (II OF 1899), S. 2 (10) — Document neither ambiguous nor incomplete—Recitals in the document to be generally a safe guide for interpretation—Document whether release or conveyance (F.B.) .. 5

———Art. 58 of Sch. I and S. 2 (24) — Document styled as declaration trust — Whether could be treated as a settlement deed (F.B.) .. 2

———Art. 58 of Sch. I and S. 2 (24) — 'Settlement'—Definition — Document styled as Wakf-alal-aulad — Whether could be construed as a settlement deed (F.B.). .. 2

TAMIL NADU AGRICULTURISTS RELIEF ACT (IV OF 1938), S. 4 (e)—Central Bank of India — Loan advanced under mortgage by deposit of title deeds and hypothecation bond covering banana crops—Suit by bank for balance of amount due—Claim by debtor for benefits under Act IV of 1938—Suit decreed—Appeal by judgment-debtor—Judgment-debtor though an agriculturist by virtue of S. 4 (e) held not entitled to the benefits of the Act .. 3

TAMIL NADU BUILDINGS (LEASE AND RENT CONTROL) ACT (XVIII OF 1960), S. 14 (1) (b)—Landlord seeking eviction of tenant—Ground of demolition and reconstruction—Motive therefor irrelevant.. 9

———as amended by Act (XXIII of 1973), S. 14 (1) (b) — Applicability — Bona fide requirement of building for immediate demolition—Scope—Demolition to be total—Removal of roof would not amount to demolition .. 6

TRUST—Dedication of properties for conducting charity—Revocation — Validity — Subsequent conduct of settlor in not giving effect to it not rendering the trust nugatory .. 7

MUSINGS ON 1977

by

PROF. S. VENKATARAMAN.

The year 1977, by and large, has been an eventful year both at home and abroad. The Congress Party which was in power at the Centre for an unbroken period of almost thirty years met its Waterloo in the battle of the ballot at the hands of the Janata Party which emerged on the eve of the elections and a ministry formed by that party at the Centre has been functioning for about nine months now. The Janata Party has acquired a political identity, but it is yet to achieve an integrated personality of its own based on a synthesis of shared ideals or common purposes other than merely holding together to run the Government so as to ensure for it effective credibility. Naturally every new Government is expected to redeem the election pledges and promises on the basis of which it was voted to power so as to avoid being said of it:

"The only difference after all the rout,
Is that the one is in, the other out."

The Janata Party contains eminent legal luminaries like Sri K. S. Hegde (retired Judge of the Supreme Court and currently Speaker, Lokh Sabha), Sri N. A. Palkhivala (currently Ambassador to the United States of America), Sri Shanti Bhushan (currently Minister for Law) and others. Sri Shanti Bhushan is one of the top class lawyers in the country and the legal profession, in particular, pins great hopes on him to undo and remedy undesirable exercise of executive power manifested in some directions during the period of emergency. There is the story of a former British Prime Minister remarking about a young political aspirant: "I thought he was a man of promise; but I soon discovered that he was only a man of promises". It is to be hoped that the Minister for Law will, by his acts show that he is made of sterner stuff and is totally dedicated to his work.

The Greek historian Diodorus Seculus recorded that in ancient India an adviser to the State was permitted three errors before he was banished from public life and that in the city states of Greece politicians proposed new laws with a noose round their necks and if a law failed to get approval they were hanged. But even such desperate recipes could not ensure good Governments or good laws. It only means that public opinion has to be alert and vigilant all the time.

The outgoing Government itself lifted the emergency before it went out of office. Civil liberties were restored in its wake and the present Government is striving to give meaning and direction to it. This is but just and proper. As Winston Churchill once observed, "the distinction between civilisation and tyranny could be summed up in two words —*habeas corpus*".

Domestic front: the Judiciary.—In a federal democracy certain things are fundamental: (*i*) The Constitution is supreme; (*ii*) No one is above the law; (*iii*) Independence of the judiciary is to be cherished and sustained. Naturally the legal profession felt disturbed and reacted sharply to the previous Government's gambit to have a judiciary made to measure. There were occasional snipings at the Supreme Court in the early days of independence. A dignified rejoinder was made by Patanjali Sastri, CJ., in

V. G. Row's case[1], where he observed: "If the Courts in India discharged their difficult task, it was not out of a desire to tilt at Legislatures in a crusader's spirit but in discharge of their plain duty under the Constitution. This was particularly true of fundamental rights of which the Supreme Court had been constituted a sentinel on the *qui vive*". When *Golaknath's case*[2], was decided, some politicians described the majority judgment as a 'confrontation' between the Supreme Court and Parliament for supremacy and some time later the theory of "committed Judges" was propounded. The final irritant was the majority judgment in the case of *Kesavananda Bharati* v. *State of Kerala*[3], holding that Parliament had no power to amend the basic features of the Constitution. This led to the passing of the Constitution (Forty-second) Amendment prescribing a special bench of seven Judges of the Supreme Court to decide cases involving questions of the constitutionality of any central enactment and a special majority of the Bench to declare such law as invalid. Talk of a 'confrontation' between the Supreme Court and Parliament is mischievous. Denigration of the Judiciary can do no good. For a spirited and closely reasoned reply defending the Judiciary and its attitude in *Kesavananda Bharati's case*[3], one may peruse with profit Sri Jaganmohan Reddy's booklet on Social Justice and the Constitution. Lord Denning M. R., finds that the Supreme Court deserves praise for its upholding the rule of law in critical times[4].

In a democratic order none can be above the law. While it is desirable to inject justice into politics, it is disastrous to inject politics into justice. The recent judgment of the Court of Appeal in England rejecting the claim made by the Attorney-General, Silkin Q. C., that he is only responsible to Parliament and is not bound by the law is at once a warning and lesson of utmost import to all persons interested in the rule of law. Lord Denning, M. R., made the trenchant observation "Be you ever so high, the law is above you". An unpleasant manifestation of executive power during the emergency period was in relation to the transfer of quite a number of Judges from one High Court to another for allegedly political reasons. It even led to the filing of a writ petition challenging the constitutional validity of such transfers. The Supreme Court has now ruled that the consent of the concerned Judge is not necessary to his transfer in terms of the Constitution and is taken only as a matter of courtesy having regard to the high position of the Judge and that a Judge could be transferred even against his wishes in the public interest such as administrative exigencies, factious local atmosphere or a Judge having a circle of favourites and non-favourites. At the same time, the Supreme Court has suggested that to avoid charges of misuse of power the Chief Justice of India should be consulted substantially and effectively, his advice should not be treated cavalierly, and disregard of his opinion may well point to extraneous considerations at work. Transfer of Judge for honourable reasons and with his consent would be unexceptionable but a transfer for ulterior reasons or from questionable motivation will be bitterly resented. Transfer of High Court Judges has been considered desirable by the States Reorganisation Commission for promoting national integration and the Law Commission has favoured the proposal. Right now when English continues to be in use in the High Courts language would not be a serious problem. Even later a knowledge of English and Hindi, as envisaged by the three language formula should stand a Judge in good stead anywhere in the country.

Law's delays and arrears in Courts.—Litigation is an activity that does not markedly contribute to the happiness of mankind, though it is sometimes unavoidable. Once initiated it drags on like a turtle. The Court is not a computer registering what is fed into it and answering by mechanical intelligence. The Court administers justice according

1. 1952 S.C.R. 547, 605, 606.
2. (1967) 2 S.C.R. 762.
3. A.I.R. 1973 S.C. 1461.
4. See the Supreme Court of India by Rajeev Dhavan, Foreword by Lord Denning.

to law and it endeavours to get at the truth with impartial tools, objectively and unbiased. It is a sad fact that over the years institution of cases and disposals have not kept pace. A huge backlog of arrears exists in the several High Courts as well as in the Supreme Court. It is admitted that justice delayed may often be justice denied. It is equally recognised that speedy justice should not be hustled justice. It is also eminently desirable that the gap between the date on which a case is first filed in a Court and its final disposal by the highest Court in appeal should not exceed twelve months. All these sound like copy book norms. The real question is one of the adequacy of whatever has been done hitherto to control law's delays and clear the backlog or whether there has been only a polishing of the brass when the ship is collapsing. Various contributory factors, all of them familiar, for law's delay and accumulation of arrears have been listed, such as population growth, greater awareness of his rights by the average citizen, phenomenal increase in trade and commerce, inadequacy of Judges, unsatisfactory recruitment, failure to fill up vacancies as and when they arise, slow disposals, multiplicity of judgments in Supreme Court appeals not all of them being reconcilable, citation of too many authorities, lengthy argument by counsel, cumbrous and technical laws of procedure, defective drafting of legislation etc. In a similar way various remedial measures have been put forth to meet the problem of law's delay and arrears in Courts, such as appointment of more Judges, provision for sitting of High Court Benches at mofussil stations, empowering single Judges to dispose of cases now requiring a bench of two Judges for the purpose, appointment of *ad hoc* Judges to clear arrears, dispensing with the requirement of printed copies of judgments for purpose of appeal and allowing in their place typed copies, to be given by the Court to the parties as carbon copies of the original judgment even while preparing the fair copy of the judgment, replacing chief examination of witnesses by affidavit evidence subject to the availability of the deponents for cross-examination when desired, avoiding cursory disposal of cases, for instance by dismissing a suit or appeal for default of appearance of parties by curbing as far as possible *ex parte* disposal of cases so that addition to litigation through restoration petitions may be minimised, imposition of time-limit on arguments, submission of written arguments, replacement of the system of payment to lawyers on the basis of day fees by a system of consolidated fees for the whole case, enlargement of the scope of section 250, Civil Procedure Code and imposing penalty with liability to pay compensation to the other party by a person deliberately bringing a false, frivolous or vexatious case, Judges in the High Court devoting more time to the hearing of cases and dictating judgments in their homes, imposing a limit of time for disposal of cases and so forth.

It is clear that law's delay is attributable in the ultimate analysis not to any one individual or body like Government, Courts, Lawyers, Legislative draftsmen or Litigants but to all of them in varying degrees. Government which often bemoans law's delays, has itself to set a better example in the matter. Government is the largest single litigant. It is therefore pertinent to examine how it acts as a litigant. The lethargy and lack of concern on the part of the executive in discharging its functions in time as a participant in a litigation has come in for strong criticism by Courts. A bench of the Supreme Court in dismissing an appeal from a judgment of the Bombay High Court in a civil case found that "the State as a party has frequently been displaying remissness in filing statements, counter-affidavits or motions for *ex parte* stay or injunction in the lower Courts including the High Court. Thus a considerable contributory to litigative slow motion is Government itself". The Court observed further that in view of the large expense involved in fighting a litigation in the Supreme Court, it was "all the more necessary that the State Governments which have public accountability in respect of their actions, should not lightly rush to this Court to challenge a judgment of the High Court which is plainly and manifestly correct

and drag the opposite party in unnecessary expense part of which could in any event not be compensated by the award of costs".

It is equally pertinent to inquire why vacancies of Judges in the High Court, sometimes more than half a dozen in a single High Court should have remained unfilled for long spells. For instance, in the Mysore High Court with a sanctioned strength of 17 Judges, 14 permament and 3 additional, more than a third of its strength remained vacant from 1974. The same is the story with some of the other High Courts as well. It looks strange that Government which has contributed not a little by its action and inaction to law's delay should deplore the increasing accumulation of arrears in Courts.

How the requirement of benches with a strength of not less than seven Judges in the Supreme Court to decide cases involving the constitutional validity of any legislation affects the working of that Court and adds to arrears is highlighted by recent judgments of that Court. In *Trustees for the Improvement of Calcutta* v. *C. S. Mallick*[5], Bhagwati, J., speaking for the Court observed: "This Court has a dual responsibility to the country. It has to decide the cases brought before it justly and satisfactorily and at the same time, liquidate arrears of pending cases. Both bear upon the credibility of the judicial system. But because of Article 144-A brought in by the Forty-second Amendment Act seven Judges of this Court have to sit and hear every case where the constitutionality of an Act, Rule, Bye-law or even a small notification is challenged. Processual pragmatism in the light of actual experience of the working of this Court will easily convince anyone that, in the context of the current docket explosion and long pendency of cases, the insistence on this inconvenient plurality which requires more than half the full strength of the Court to sit to hear such cases is a step in the wrong direction. Many questions of constitutional importance have already been covered by the rulings of this Court so that he who runs and reads may resolve them. To require seven Judges to perform such jobs is surely supererogatory. The present appeal itself is a striking illustration. Where really important issues arise for consideration, any bench of this Court, would certainly refer, where necessary, such matters for consideration or reconsideration by a larger bench, less or more than seven, according to the requirement of the situation. To prescribe arithmetically is to petrify unimaginatively. We do not say anything about the validity of Article 144-A one way or the other but merely highlight the paralysing impact on the highest Court of justice, flowing from the numerical rigidity newly inserted by the Forty-second Constitution Amendment Act. We hope and trust that this matter will receive urgent attention of parliament".* In a similar vein, in *Misrilal Jain* v. *State of Orissa*[6], Chandrachud, J., speaking for the Court said: "A Court which has large arrears to contend with has now to undertake an unnecessary burden by seven of its members assembling to decide all sorts of constitutional questions no matter what their weight or worth. It is hoped that Article 144-A will engage the prompt attention of the Parliament so that it may, by general consensus, be so amended as to leave to Court itself the duty to decide how large a bench should decide any particular case".*

Apropos of imposing a time-limit for disposal of cases the Committee appointed by the Bar Council of India for suggesting ways and means for expediting disposal of civil and criminal cases and for clearing the arrears in the various Courts has recommended the limits of time within which the judicial proceedings of various classes should normally be brought to a conclusion in the Courts in which they are instituted: (*i*) a regular original suit in a Court of a munsif, or

5. (1977) 2 S.C.J. 315, 320.

*Parliament has now responded by enacting the Forty-fourth Amendment, to the Constitution doing away *inter alia* with the impugned provision.

6. (1977) 2 S.C.J. 864: A.I.R. 1977 S.C. 1686.

subordinate judge at a year to 1½ years; (*ii*) contested first appeal 6 months; (*iii*) second appeal in the High Court within one year; (*iv*) civil first appeal in the High Court within 2 years; (*v*) all writ petitions, revisions and criminal appeals within a period of 2 months to 6 months. For clearing arrears the Committee has suggested that a Judge of a High Court should normally decide 650 cases per year and consequently the strength should be raised to bring the number of Judges in proportion to the number of cases filed in the High Court. Further for clearing the arrears the Committee has recommended the appointment of additional and *ad hoc* Judges for a period of two years to clear the said arrears within that time. Presumably the yard-stick of 650 cases has reference to contested cases and excludes what have come to be known as disposals for statistical purposes. Again to expect disposals of writ petitions within 2 to 6 months is ambitious. At present they seem to take more than 2 years.

One is apt to overlook the fact that backlog of cases in the appellate Courts would be appreciably reduced in course of time, if resort by litigants to the Courts at the lower levels for everything is checked and controlled. If people can be persuaded to get disputes settled by arbitration that would greatly help. *Apropos* of this it is interesting to note that in the United States, to make justice faster, fairer and more accessible to the people, in regard to certain types of disputes such as neighbourhood, family, housing and consumer problems which cost too much and take too long to go to Court, the Carter administration has suggested as a means of relieving the overloaded Courts the starting of "neighbourhood justice centres" and provided funds for the purpose. There will be no Judge or jury. Instead the emphasis will be on mediation and the Centres will only intervene if both parties agree. It will be worth while to study the working of the institution.

Social Legislation.—Reform of public conscience and normal and social values is the indispensable preface to every statute and its unwritten preamble[7]. In the absence of enlightened social conscience, traditions and usages hold the parties bound. Experience shows that in matters like abolition of the dowry system, abolition of untouchability, abolition of child marriages, etc., statutes alone have not been able to achieve much. Public conscience cannot be created by statute. It wakes up through economic pressures and education. Marriage is very much a social institution and any change therein cannot but fly in the face of some harsh facts relating to the social situation in the country. Neither the provisions of the Child Marriage Restraint Act nor those of the Hindu Marriage Act have made much impact outside the sphere of "educated" classes. There are some facts which are revealing. Last year, it is reported that there was a mass marriage ceremony of 10,000 babies in Marwar. Again the Defence Ministry seems to have been shocked earlier to find that some of the widows of persons killed in the Bangla Desh war in 1971-72 were below 15 years. Among economically backward classes, the age of marriage is a matter of off-loading of girls as a liability at the earliest opportunity. There are in some communities inward-looking marital norms compelling early marriages in the scramble for the limited number of eligible boys of the concerned sect or clan. The age limits set by the Hindu Marriage Act do not touch the Scheduled castes and Scheduled tribes. Where female literacy is low, child marriages are rampant as in Uttar Pradesh, Bihar and Rajasthan. A Bill has been introduced in Parliament to raise the age of marriage for girls to 16 and that of boys to 21 from 15 and 18 respectively. It is hoped that the raising of the age of girls to 16 will conduce to slow down births. Offences under the Act would be cognisable and this may operate as an effective deterrent.

There are some other aspects of marriage laws calling for serious thinking and early attention. It is familiar knowledge that the economic conditions particuarly of

7. The New Jurisprudence by P.B.Mukharji, p. 62.

the middle classes have changed in such considerable measure as to call for fresh adjustments. A steadily increasing number of women are getting educated and in many cases it is found that unless both the spouses are employed they cannot run their household decently. This has given rise to new problems like matrimonial home, sharing of expenses, separate savings of spouses, rights and obligations of spouses *vis a vis* their children and so on. In England many of these problems have been tackled by relatively recent legislation like the Family Provisions Act, 1966; the Family Reform Act, 1969; the Administration of Justice Act, 1967; and the Matrimonial Proceedings and Property Act, 1970. Field studies on these matters will be helpful for suggesting measures for readjustment of domestic life and the directions in which it will be needed.

The Police Commission.—The appointment of a six-member Police Commission with Sri Dharma Vira as President and Sri N. Krishnaswami Reddi, formerly Judge, Madras High Court, as one of the members with wide terms of reference the main thrust of which is to evolve measures to improve the functional efficiency of the police administration is to be welcomed. A look at the gaps and shortcomings in administrative control, legal accountability and the social role of the police at various levels is long overdue. The days are gone when the police could be looked upon more as myrmidons of law and order ready to wield the lathi, more as an instrument of suppression than as a helper and friend of the people in distress. The identification of the police with the executive rather than as a law-enforcing agency answerable only to the Courts stems from the out-dated Police Act of 1861. There has been so far no comprehensive review at the national level of the police system despite the radical changes in the political, social and economic situation in the country. The separation of the judiciary from the executive had not freed the police from magisterial control in all matters relating to law and order enforcement. Not statutes alone but to a large extent executive directions have been guiding the actions of the police in launching prosecutions or initiating punitive actions. The enquiries now going on before the several Commissions of enquiry in regard to actions taken during the emergency period have brought to light the objectionable manner in which the police had been used. The legacies of the past which have tended to demoralise the police, corrode its sense of values and make it lose the confidence of the public cannot be shed unless the political parties agree on comprehensive legislation for abolishing the practice of executive direction in matters of law enforcement. At present it is as if there is an all round presumption of distrust of police. It will improve the position very much if the Constitution made it mandatory for all the branches of the police to be guided by statutory provisions in the exercise of their jurisdiction. To project the police as a guardian of peace and rescuers of people in times of need, to ensure a complete reorientation of police outlook and approach, to shield the police from political and executive interference in the discharge of its functions would be a difficult job that requires an imaginative overhaul of the training imparted to its members. The presence of persons who have specialised in social psychology and sociology on the Commission would have helped it to make really meaningful recommendations.

International scene: The SEATO.—A notable event of some international significance was the quiet death of the South-East Asian Treaty Organisation (SEATO) on 30th June. The SEATO was born in 1954 and was one of three multi-national organisations for collective defence formed during the East-West cold war. Its main aim was the containment of communism in South-East Asia. Its founding father was Mr. John Foster Dulless, the then U.S. Secretary of State. It members were the United States, the United Kingdom, France, Australia, New Zealand, Philippines, Thailand and Pakistan. Bangkok was its headquarters. An odd feature of the SEATO was that it designated the territory of non-members like Laos, Cambodia and South Vietnam as areas for

defence against communist aggression. France opted out of its military commitments in 1967 and withdrew financial support in 1974. Pakistan withdrew from the Organisation even earlier in 1973 when it failed to get its support in its conflicts with India. The other two Asian members, Thailand and Philippines suggested the winding up of the SEATO in view of the new power balance in South-East Asia in the wake of the emergence of a united Vietnam and Cambodia's becoming a communist State. The SEATO was accordingly wound up with none to shed a tear over its passing away. John Foster Dulles could hardly have visualised his military creation folding up without firing even a single shot in battle as the entire region of the former Indo-China fell into the hands of the communists.

Withdrawal of U.S. from I.L.O.—The withdrawal of the United States from the International Labour Organisation is another notable international event. The International Labour Organisation was originally created under Part XIII of the Treaty of Versailles in 1919. By constitutional amendments in 1945 and 1946 it became a "specialised agency" brought into relationship with the United Nations by a special relationship agreement. Its main object was that economic competitions between States or other similar conditions should not militate against the realisation of minimum as well as uniform standards of labour throughout the world. An outstanding feature of the Organisation is its tripartite character as it is representative in its bodies of Government, employees and employers marking a departure from the general trend of internationl practice that States alone should be represented in international institutions. The United States is a country with employment of labour on the grand scale. It is also making substantial contribution to the finances of the Organisation. Presumably because of a feeling that politics has intruded into the Organisation and that the U.S. is not able to have its influence felt in a manner commensurate with the importance of the country and the financial contribution it was giving, it has chosen to withdraw from that body. It is a pity that this should happen at a time when more and more of international co-operation would be welcome in the cause of world peace and security.

1977 New York Conference on the Law of the Sea.—The Conference of 157 nations of the world under United Nations auspices which met at an eight-week session in New York last year could not reach agreement over a single text for negotiating on the problems of international stewardship of the ocean floor beyond the limits of national jurisdiction so that the riches of the sea could be shared equitably by all the countries. The conference decided to meet again this year. Accordingly amidst hopes of a break-through at least this year, the 157 Nations Conference began an eight-week session at New York on 24th May, 1977. The discussions turned on the role of the international seabed authority to be set up and how the treasures of the sea are to be exploited by the mining arm of the authority. The United States urged that private companies should be allowed to have a key role in mining. Ideological differences as well as the self-interest of the participating nations have again precluded any final acceptable understanding. The Conference concluded on 15th July, and will re-convene in Geneva in March, 1978. For the precise results one has to see "the composite negotiating text" which would "show in foetus form the future child". The composite agreement is only for the hard negotiations ahead and is not a negotiated accord. The earlier rounds of talks had only generated 'single negotiating texts' reflecting the patterns of contention on subjects, such as the limits of the territorial seas; the demarcation of the continental shelfs; the spread and status of the economic zones beyond the territorial waters; the set-up of an international seabed authority; a forum for settling disputes on the distribution of the common heritage of the high seas'; and the rights of navigation over and scientific research in the waters of the coastal States, etc.

The composite negotiating text is however a step-forward in the sense that it

is a piecing together of all points of friction for final parleys, whereas all that the chief U.S. negotiator, Mr. Elliot Richardson, would say was, "I don't think I could very well say that the positions have softened, in the sense that in principle each side is holding for its basic approach, but there has been convergence", particularly on the matter of deep-seabed mining. He was obviously referring to the fact that the developing countries, which had originally insisted that an international authority should have charge of all exploitation of the sea's riches for fear that the advanced countries (exclusively in possession of the financial and technical resources required to do the job) would run away with the whole cake, have now accepted that there is a place for both private and international enterprises to mine the sea's resources, and that scope has to be given to those who have the financial and technological capacity to conduct exploitation. India has suggested that the proposed international agency and the multinationals be both permitted to do the exploration for a trial period of 20 years after which the situation could be reviewed.

Apart from what system of exploration should prevail, the key issues still to be negotiated are the legal status of the 200-mile economic zone, conduct of marine scientific research in that zone and the machinery for settlement of disputes between States. The maritime States want it specifically laid down in the treaty that the coastal States would have sovereign rights only over the economic resources of the 200-mile zone which would in all other respects have the character of high seas and be open to maritime and naval uses by all countries. The advanced countries also want freedom to conduct scientific research in a coastal State's economic zone. There are then the land-locked States which do not want to be left out in the cold. The Law of the Sea Conference is scheduled to meet again next year in Geneva and will have for a working paper the "composite negotiating text"—the fourth of the series—drafted in New York. The outstanding legal issues are so bound up with national sovereign rights and economic interests it would be a pleasant surprise if agreement on a treaty emerges from Geneva[8].

8. *The Hindu*, 20-7-1977.

NEW JUDGES FOR THE HIGH COURT.

It is gratifying that at long last the Central Government has started filling up the vacancies in the posts of Judges in the different High Courts in the country which had fallen vacant and remained unfilled for quite sometime and in quite a large number. A few days ago it was announced that seven Judges were appointed to the Allahabad High Court and six to the Karnataka High Court. Appointments have been made to certain other High Courts as well. The appointment of four Judges—Mr. S. Padmanabhan, Mr. M. A. Sathar Sayeed, Mr. T. S. Sathiadev and Mr. Nainar Sundaram—has come not a day too soon. It had been often pointed out that it was incongruous for Government to harp upon delay in the disposal of cases and backlog of cases in the High Courts when one of the contributory factors had been the Government's keeping a fairly large number of Judges' posts vacant whatever might be the reason therefor.

We offer a cordial welcome to the new Judges. Appointment as a Judge, though it may appear as an achievement, really puts a man on his trial inasmuch as just a tree is known by its fruits a Judge is inevitably judged by the quality of his judicial work, by his deportment and demeanour on the Bench. The credentials of the new Judges are full of promise as seen from the relevant details relating to them given hereunder. All of them will be having a fairly long tenure on the Bench, long enough to leave a mark. The time for assessment of their work will be when they retire. In the meanwhile it is to be fervently hoped that in the discharge of the duties of their exalted office they will bring to bear the qualities of receptivity, understanding, patience, independence and above all the human touch, maintaining the dignity of the Bench and the high traditions of their office.

Mr. S. Padmanabhan, comes from a distinguished family of judges and lawyers. After obtaining his honours degree from the Loyola College, Madras, he took his law degree from the Trivandrum Law College. He set up practice in Travancore in 1947. After the re-organisation of States, he started practice in Madras. He also enrolled himself as an advocate of the Supreme Court in 1956, and made his mark both on the appellate and original sides. He is the son of the late Mr. K. Sankarasubbaier, Judge of the Travancore High Court and the brother of Mr. T. S. Krishnamoorthi Iyer, formerly a Judge of the Kerala High Court and currently a Senior Counsel of the Supreme Court.

Mr. M. A. Sathar Sayeed, had a brilliant academic, career, took his law degree in 1952 and worked in the offices of Mr. C. A. Vaidyalingam, Mr. K. Ramachandra Rao and Mr. T. Venkatadri, all the three becoming Judges. He enrolled himself as an advocate of the Madras High Court in 1954 and worked in close association with Mr. Justice M. M. Ismail and Mr. Justice P. R. Gokulakrishnan, before their elevation to the Bench. He was legal adviser to the Tamil Nadu Wakf Board, National Small Industries Corporation Limited and the Muslim Educational Association of Southern India. He was recently appointed Special Counsel by the State Government to conduct the appeal, on behalf of the Thanjavur Co-operative Marketing Federation Limited, Tiruvarur before the Tribunal against the orders of the Joint Registrar of Co-operative Societies (Surcharge). He is a cousin of Mr. Basheer Ahmed Sayeed, a former Judge of the High Court.

Mr. T. Sathiadev had been at the Bar for about 25 years and till his elevation Government Pleader. He had his education in the Presidency College, Madras. After securing his law degree from the Madras Law College, he worked as Legal Adviser to the Tamil Nadu Electricity Board and the Indian Overseas Bank. He had appeared in major arbitration disputes on behalf of the Indian Oil Corporation and the Government of India. He was appointed Assistant Government

Pleader in 1968 and Government Pleader in 1976.

Mr. Nainar Sundaram, who hails from Tirunelveli, is the son of a former District and Sessions Judge, the late Mr. Herbert Sundaram. After obtaining his commerce degree from the Loyola College, Madras, he took his law degree and enrolled himself as an advocate of the Madras High Court in 1955. He had his apprenticeship under Mr. Justice T. Ramaprasada Rao. He practised for some time in Coimbatore before coming to Madras and worked as assistant to the Special Public Prosecutor, Mr. N. Krishnaswami Reddi, before the latter was elevated to the Bench. He is known to be interested in Vedanta and takes keen interest in all cultural matters.

A CRITICAL NOTE ON "RENGA IYENGAR v. SIVASAMIPANDARAM" (1977) 2 M.L.J. 265: 90 L.W. 559.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

The facts of the case are simple. The property belonged to "R". Under a document dated 17th August, 1957, "S" was given the right to collect the coconut usufructs for a period of one year. Every year upto 1967 "S" executed similar documents and there was no document subsequent thereto. "R" filed a suit in 1968 for permanent injunction or in the alternative for possession. "S" contended that the transaction was a lease of agricultural land, that he was entitled to the benefits of the Cultivating Tenants Protection Act and that the suit was bad for want of proper notice to quit.

Both the lower and lower appellate Courts held that there was a lease of both the land and the trees and that there was no proper notice to quit. "R", therefore, preferred a Second Appeal to the High Court.

Justice V. Ramaswami found that "S" was only a licensee and the transaction was not a lease. However his Lordship held that "S" is a lessee of the coconut usufruct for an indefinite period and so the transaction will amount to an agricultural lease of an interest in immovable property, in which case, the lease had to be terminated by a notice to quit as contemplated under section 106 of the Transfer of Property Act or grounds of equity, justice and good conscience.

It is respectfully submitted that the decision requires reconsideration.

In fact the later part of the judgment seems to run counter to the finding given in the earlier part and is contrary to the decisions of the Supreme Court and our High Court.

Even on facts, his Lordship seems to have overlooked the significant fact that the lease is not for an indefinite period but for a definite period of one year.

As early as 1953, the Supreme Court has held in *Firm C.J., Patel* v. *State of Madhya Pradesh*[1], that the right to collect timber, teak and tendu leaves is only a license and not a lease. This decision has been followed in several decisions of the Supreme Court and our High Court *Ananda Behera* v. *State of Orissa*[2], *Associated Hotels of India* v. *R.N. Kapoor*[3] *M.N. Clubwala* v. *Fida Hussain Saheb*[4] *B.M. Lall* v. *Dunlop Rubber Company*[5], *Panchapagesan* v. *Swaminathan*[6], *A. Govindasamy Vanniar* v. *S. Mahalakshmi Ammal and others*[7], *Arumugha Vellian* v. *Angamuthu Nattar*[8] and *Govindaraja Mudaliar* v. *Elliamman Temple*[9]. In *Commissioner of Income-tax* v. *Benny Kumar Subas Ray*[10], the Supreme Court has held that the terms "agriculture" would consist of basic operations like sowing, planting requiring expenditure of human skill and labour on the land itself and subsequent operations such as protection of crops, pruning, cutting harvest

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1. 1953 S.C.J. 96: 1953 S.C.R. 476: A.I.R. 1953 S.C. 108.
2. (1956) 1 M.L.J. (S.C.) 69 : 1956 S.C.J. 96 : (1955) 2 S.C.R. 919 : A.I.R. 1956 S.C. 17.
3. 1960 S.C.J. 453 : (1960) 1 S.C.R. 368 : A.I.R. 1959 S.C. 1262.
4. (1964) 2 S.C.J. 448 : (1964) 6 S.C.R. 642: A.I.R. 1965 S.C. 610.
5. (1968) 1 S.C.J. 644 : (1968) 1 S.C.R. 23 : A.I.R. 1968 S.C. 175.
6. (1971) 2 M.L.J. 169.
7. (1963) 2 M.L.J. 137.
8. (1965) 1 M.L.J. 170.
9. (1972) 2 M.L.J. 357 : 85 L.W. 793: A.I.R. 1973 Mad. 176.
10. 1957 S.C.J. 740 : 1957 2 M.L.J. (S.C.) 145 : 1958 S.C.R. 101 : (1957) An.W.R. (S.C.) 145 : A.I.R. 1957 S.C. 768,

etc., and that in order to constitute "agriculture" both operations must co-exist. This decision has also been followed by our High Court in the various decisions referred to above. There is also the latest decision of the Supreme Court reported in *Board of Revenue* v. *A.M.Ansari*[11], in which the Supreme Court has held that a license does not create an interest in the property to which it relates while a lease does and an agreement relating to a right to collect the usufruct is only a license and not a lease.

Applying these principles laid down by these decisions we find that (1) "agriculture" must consist of both basic and subsequent operation (2) a mere right to collect the usufruct will not amount to "agriculture" and will not amount to any transfer of interest in immovable property and no interest in land is created.

With regard to the case under review it will be found that the agreement created only a right to collect the usufruct for a period of one year. There was therefore no "agricultural lease"; no interest in immovable property is transferred and there was no interest in immovable property created.

Under the Transfer of Property Act, a lease is a transfer of interest in immovable property. His Lordship has correctly found that there is no transfer of interest in immovable property and the grant is only a licence. It may be that the provisions of the Transfer of Property Act, with regard to the issue of notice to quit can be applied on grounds of justice, equity and good conscience to agricultural leases.

But here, it is a case of only licence and not a lease whether agricultural or otherwise. So there is absolutely no necessity to issue a notice to quit.

For the foregoing reasons the decision requires reconsideration.

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11. (1976) 3 S.C.C. 512 : 38 S.T.C. 577 : (1976) 3 S.C.R. 661 : A.I.R. 1976 S.C. 1813.

POWERS OF THE COMMISSIONER OF CORPORATION OF MADRAS.*

By

R. THILLAI VILLALAN, M.A.B.L.

In the first part of the Article two different definite findings were given:

I. The Commissioner of the Corporation of Madras has no power to take disciplinary action against Class III and Class IV employees of the Corporation without Bye-laws made by the Council under section 86 (1), sub-clause (2) of the Madras City Municipal Corporation Act, 1919. This was by Justice. K.N.Mudaliyar in *P.G. Arunachalam* v. *Corporation of Madras by its Commissioner*[1].

II. "The Commissioner of the Corporation of Madras has power to take disciplinary action against the Class III and Class IV employees of the Corporation who were in service of the Corporation prior to the Tamil Nadu Amending Act LVI of 1961 which came into force on 14th April, 1962". This view was given by Justice M.M. Ismail in *M. Parthasarathy* v. *Corporation of Madras*[2] and *P.D. Balasubramaniam* v. *The Corporation of Madras represented by its Commissioner*[3]. In order to set right the legal position in this regard, the matter was taken for review in the *Corporation of Madras by its Commissioner* v. *P.G. Arunachalam*[4] stating that the petitioner, due to inadvertance, was not able to produce the unreported Division Bench decision of *L. Sivanarayana Das* v. *Corporation of Madras represented by its Commissioner and another*[5], by Veeraswamy, CJ., and Gokulakrishnan, J., which would make the petition to stand dismissed. But the petition was disposed of by stating. "Admittedly, the judgment of the Division Bench (Veeraswamy, CJ., and Gokulakrishnan, J.,) in *L. Sivanarayana Das* v. *Corporation of Madras by its Commissioner and another*[6] has not been brought to my notice. The petitioner pleaded 'inadvertance' for his not producing the judgment of the Division Bench. I am afraid, under Order 46, rule 1. 'Inadvertance' is not a ground. The judgment of the Division Bench was delivered as early as 15th July, 1969, and it is significant to notice that the petitioner was the first respondent in that case. The respondent in W.P. No. 230 of 1971, (the review petitioner) was possessed of the knowledge of the existence of the judgment of the Division Bench since 1969. The plea of "inadvertance" is not a ground within the meaning of Order 47, rule 1 for reviewing the order of this Court.

Now, the actual position is made clear by P.S.Kailasam, CJ., and V. Balasubrahmanyan in the Writ appeal, the *Commissioner of Coporation of Madras* v. *P.G. Arunachalam*[7]. The Commissioner of Corporation of Madras has powers to take disciplinary action against Class III and Class IV employees if they entered service before the Amending Act LVI of 1961 came into force and, he has no powers against them if they entered service after the said Act.

In the Writ appeal, P.S.Kailasam, CJ. said the following:

"The question that arose for consideration was whether the Commissioner had power to impose the punishment of stoppage of increment. The contention is that, though section 96 of the Madras City Municipal Corporation Act, 1919 (before its amendment by Act LVI of 1961) provided

* The first part of this Article was published at page, 9 Journal part of (1975) 1 M.L.J.

1. (1974) 1 M.L.J. 364.
2. W.P. No. 3290 of 1971.
3. (1974) 2 M.L.J. 394.
4. (1974) 2 M.L.J. 43 : 87 L.W. 454 (1) : A.I.R. 1974 Mad. 288.
5. W.A. No. 188 of 1967.
6. W.A. No. 188 of 1967.
7. (1977) 2 M.L.J. 274.

that the Commissioner could impose the penalty of withholding the increments of promotion including the stoppage of efficiency bar, the amended act did not provide for any such punishment. Section 36 of the LVI of 1961 corresponds to section 96 of the old Act. It provides that in the case of employees in Class III, to which the respondent belongs, the punishment which is provided for by the bye-laws made by the Council under section 349 could be imposed. It is common ground that no bye-laws have been framed by the Council. Therefore, the contention is that the Commissioner had no power to impose the punishment which he did, under the amended Act. To this contention the answer of Mr. S. Palaniswamy, the learned counsel for Corporation is that the amended Act provides for transitional powers under section 102 read with Schedule II of the Act. Section 102 of Act LVI of 1961 provides that the new Act should be read subject to Schedule II and power to remove difficulties. The provision states that in first giving effect to the provisions of the principal Act, they shall be read subject to the Rules in Schedule II. Rule 5 of Schedule II provides that every person included in the Corporation establishment immediately before the date of the commencement of the new Act and who was employed by the Corporation wholly or mainly in connection with the affairs of the Corporation immediately before the said date shall on and from that date, hold his office in the Corporation by the same tenure at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matters as he would have held the same on the date aforesaid if the new Act had not been passed and shall continue to do so unless and until his remuneration, terms and conditions of service, and his rights and privileges are so altered as to be on the whole not less favourable to him than those to which he was entitled immediately before the said date. This provision makes it clear that an employee shall be subject to the terms and conditions of the office which were in force before the new Act was passed till bye-laws are framed under the new Act. The respondent was admittedly recruited to the Corporation service long before the new Act came into force and the old provisions are applicable to him. As the old Act is applicable regarding service conditions, the punishment imposed on the respondent is in accordance with law.

.....This was the view of a Bench of this Court in W.A. No. 188 of 1967 (dated 15th July, 1969. The Bench observed that section 102 provided the power for making transitory provisions and that Schedule II to Madras Act LVI of 1961 by rule 5 clearly covered the gap brought about by the said amendment and preserved to the Commissioner all the disciplinary powers which he had immediately before the enactment and coming into force of Act LVI of 1961. In that case the employee belonged to Class III and was appointed to the Corporation service prior to the new Act. It was held that the employee would continue to hold the office by the same tenure at the same remuneration and upon the same terms and conditions and with the same rights and privileges as he was entitled to before the new Act.

.....Learned counsel for the respondent brought to our notice a recent decision of a bench of this Court in W.A. No. 143 of 1974 where it has been held that the provisions of section 102, Schedule II are not applicable. In that case the employee was recruited after the amended Act came into force. Therefore that decision has no application to the facts of this case..... The Writ Appeal mentioned in the above judgment was against

the decision of Justice K.N. Mudaliyar in *Kuppusamy* v. *Corporation of Madras*,[8] by Veeraswami, C.J. and S. Natarajan, J.). Even after all these judicial pronouncements, the Corporation of Madras has not taken steps to frame bye-laws under section 86 sub-clause (2) of the Madras City Municipal Corporation Act, 1919. The lacuna created by the lethargy of the Corporation is still there.

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8. (1976) 1 M.L.J. 280.

ANOMALY IN THE TAMIL NADU INDEBTED AGRICULTURISTS (TEMPORARY RELIEF) ACT (XV OF 1976).

By

T. S. SUBRAMANYA IYER, *Advocate. Tiruchy.*

The Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XV of 1976), which came into force on 15th January, 1976 and enured till 15th January, 1977 and extended by Act III of 1977, Tamil Nadu, suffers from a lacuna and an anomaly, in that, in the definition of the term "debt" it has not included a decree debt, unlike in Act XVI of 1976. In actual practice and in the working of the Act this kind of variation in the Agriculturists Temporary Relief Act as against the Tamil Nadu Indebted Persons Temporary Relief Act XVI of 1976 has resulted in a good deal of hardship to an appreciable size of really deserving agriculturists, who require relief. For, you cannot have a stay of execution of decree debts for an agriculturist, howsoever miserably he may be placed financially. Even the original Agriculturist Debt Relief Act has not excluded a decree debt. This difference in the definition of the term "debt" has been pointed out by Justice Ramaprasada Rao in (1977) 2 M.L.J. 466. He has observed that the legislators have presumably intended to deprive the relief in the case of agriculturists in regard to decree debts.

This discrimination against agriculturists is not equitable. The anomaly is apparent when it is seen that a debt so long as it does not enter into the portals of the Court, cannot be enforced, against an agriculturist debtor and he gets the relief. But no sooner than a wily creditor files a case and his debt crystallises into a decree the relief for the debtor vanishes. Agriculturist—debtors in Thanjavur and Tiruchy districts have been particularly hard hit, now especially by the fury and the ravages of the cyclone and it is not proper and fair that decree debts should be crushing them. The definition of the term 'debt', I believe, requires to be placed on a par with that in Act XVI of 1976.

BOOK REVIEW

I. THE INDUSTRIAL DISPUTES ACT, 1947 by *C.C. Anajwala*, Sixth Edition, 1977. (Publishers: C. Jamnadas & Co., 146-C, Shamaldas Gandhi Marg, Bombay 400002). Price Rs. 22.

Labour and industrial relations form a subject of constant concern. The Industrial Disputes Act was intended to achieve harmonious relations between labour and capital and to provide a machinery for settlement of disputes by adjudication and arbitration. How far the objectives have been realised remains a moot question. Since 1947, the Industrial Disputes Act has undergone a number of amendments. A major amendment was made by Act XXXII of 1976, inserting a new Chapter V-B containing special provisions relating to lay-off, retrenchment and closure in certain establishments. The present Central Government has proposed to re-orientate and overhaul the provisions of the existing Act.

The book under notice provides a section-wise commentary of the Industrial Disputes Act. The text of the Act embodying the amendments made in Maharashtra of which the amendment of 1976 amends sections 7 and 7-A of the parent Act providing for non-judicial persons being appointed as presiding officers of Labour Courts and Industrial Tribunals is furnished. The Central and Bombay State Rules and Notifications are also given as well as the latest case law. Questions like what is an 'industry' [Section 2 (*j*)] and what is an 'industrial dispute' [Section 2 (*k*)] which have given rise to a mass of case law have been carefully examined. In that context, the decision in *Workmen Madras Flying Club v. Presiding Officer*, (1977) 1 M.L.J. 90 could have been taken note of. The provisions of the Act have been explained in a simple, accurate and helpful manner. We commend the book to lawyers and to all concerned with or interested in labour problems.

II. THE SUPREME COURT LABOUR DIGEST 1950-1976, by *S.K. Agrawal*, 1977. (Publishers: Law Book Company, P.B. No. 4, Allahabad-1). Price Rs. 70.

Labour and employment are found in every walk of life. Civil services, University services, Banking services, mines, factories, industrial establishments, shipping etc. are all concerned with labour and management problems. An entire labour jurisprudence has grown out of the decisions of the Supreme Court of India during the last 25 years and more. G.M. Kothari in his book on Labour Demands and their Adjudication, Vol. 1 observes (Preface, p.xvi) that "the Indian judiciary has yielded to the country a very rich and vast crop of precedents of labour demands...... from almost a barren and fallow field of labour jurisprudence" and has 'handed down to the world community a jurisprudence, which has redeemed the lost faith of industrial masses in law and justice'. Such being the nature of the contribution made by the decisions covering every aspect of labour law, both statutory and common law, and prodigious being the output of such decisions, a separate and specialised digest of the Supreme Court decisions bearing on and elucidating labour disputes and employer and employee relationship will serve as a time saving device and ready-reckoner particularly to lawyers and others specialising in matters of labour.

In the Preface to the Digest, the author has mentioned nine features as outstanding and characteristic of his work. Among them are: (1) The totality of the law reports published in India has been exhausted in the preparation of the Digest and the totality of the reported and unreported cases published has been covered (2) The headnotes are framed with language extracted from the judgments on a scale so extensive and self-contained as to make them quotable in Courts. It would have been helpful if the author had appended a list of the law reports and journals used by him. Opinions may also differ as to the desirability of using digest headnotes for citation. Be that as it may, the work is certainly comprehensive. The topics covered by the Digest are neatly set out in alphabetical

order and the headnotes have been given lucidly. It is easy to agree with the author that the Supreme Court "with its comparatively much smaller span of existence has decided a much larger volume of legal problems than the Privy Council did during its whole tenure as our highest Court of justice". The author has therefore done well in bringing out this Digest relating to one branch of such legal problems decided by the Supreme Court, a digest which is both efficient and dependable. It should serve well lawyers and others interested in labour jurisprudence and labour problems.

III. WORKING CAPITAL MANAGEMENT by *Anil B. Roy Chowdhury*, 1978. (Publishers: Eastern Law House, Calcutta. Price Rs. 40 : £5 : $8.

It is trite saying that capital is the source of income and income is the fruit of capital. Broadly speaking the working capital of a business represents the finance required to run its day to day working or operation of its activities. In effect, it signifies the availability at all times of enough funds to meet the current obligations and when they have to be met. Corporate business can become fruitful and prosperous only if there is enough cash generation to be ploughed back in to the business for its survival as well as for its phased growth. The terms of reference to the study group constituted by the Reserve Bank in July, 1974 for providing guidelines for followup of bank credit reveals the importance of sound working capital management. In fact the solvency of a business and its reputation in that behalf turns in a large measure on the quantum of its working capital. At the same time it is apparent that profitability is a main objective of all business. Thus liquidity and profitability are juxtaposed. It becomes therefore a headache for the management to decide whether profit should be increased with possible adverse repercussions on the liquidity position of a business or to strike a just balance between the two factors.

The book under notice endeavours to review analystically the financial problem concerned with working capital management to ensure the efficiency of business as well as its profitability. The subject is discussed in 14 chapters with illustrations and case studies adverting *inter alia* to such aspects as Operating Cycle Theory, Cash Management, Source and Application of Funds and Financial Ratios and Working Capital. The discussions are throughout practical. Persons in charge of practical business where professional management techniques are applied as well as students of commerce and business administration will find the instant book eminently useful.

IV TAX PLANNING VIA TRUST by *Kumar Parikh and Divyakant Parikh*, 1977. (Publishers: Vora Prakashan, Ahmedabad-2) Price Rs. 15.

Planning in every field has become inevitable under modern conditions of life. Tax planning has come to be regarded as a vital function of accountancy and the legal profession. In *Levines case*, (1928) A.C. 121 it is recognised that it is sound law and certainly not bad morality for a person to so arrange his affairs as to reduce the brunt of taxation to a minimum and in *Raman's case* the Supreme Court has held "that a person is authorised to arrange his affairs for reducing his tax burden." A tax-payer is free to resort to a device to divert the income before it accrues or arises to him. to reduce his tax liability. Many of the loop-holes in relation to devices like the Hindu undivided family, admission of minors to the benefits of partnership etc., used to divert the income of the planner have now been plugged fairly effectively. The utility of oral trusts and private family specific trusts are still untouched. Tax planning through such trusts to reduce one's tax burden continues therefore to be a live and profitable study.

The book under notice consists of six parts. The legal aspect of the Trust is dealt with in Part I. Part II with parts III and IV provides illustrations, and refers to the role of trust in Planning and provides drafts of trust deeds and wills. A digest of important case law relevant in regard to Tax planning is furnished in Part VI. The book also contains a discussion of sections 64 and 162 to 166 of the Income-tax Act, with calculation of

total income and reference to section 21 of the Wealth Tax Act. Guidelines are provided for filing income-tax returns. The book is written in a simple style. It should prove handy and useful to Tax Practitioners, Tax Officers, and Tax-payers.

V. TAXATION REFERENCE by *H.K. Saharay and Bijoy Sen Gupta,* 1977. (Publishers: Eastern Law House, Calcutta). Price Rs. 40 : £6 : $ 12.

Tax is an imposition by sovereign authority not correlated to any particular service rendered but intended to meet the expenses of the Government. It is either direct or indirect. Direct tax at present signifies the charge charegeable under Acts like the Income-tax Act, the Wealth-tax Act, the Gift-tax Act, the Estate Duty Act, the Super Profits Tax Act, the Companies (Profits) Surtax Act, Agricultural Income-tax and any other tax which having regard to its nature or incidence, may be declared by the Central Government to be a direct tax. Taxation is developing in many directions and the often abstruse and not lucid language in which taxation provisions are couched has given rise to subtle distinctions and to a plethora of decisions interpreting those provisions, so much so, lawyers as well as laymen have to grope, their way to get at the correct case law A ready referencer enabling them to spot out the relevant decisions to bolster up their stand and appreciate the correct position on any important question is bound to be welcome.

The book under notice endeavours to cover the entire feld of direct taxation stating the principles of law emerging from the judicial decisions constituting the *ratio decidendi.* A Comparative Table of *pari materia* povisions of the Wealth-tax Act, the Gift-tax Act and the Estate Duty Act is also provided. The Indexes relating to the Income-tax Act, the Wealth tax Act, the Gift-tax Act and the Estate Duty Act have been separately given. The book should prove useful as a *really* ready reference to lawyers and students of taxation law.

VI. THE BOMBAY SHOPS AND ESTABLISHMENTS ACT, 1948 WITH THE MAHARASHTRA SHOPS AND ESTABLISHMENTS RULES 1961, Fourth Edition by *C.G. Anajwala,* (Publishers: C. Jamnadas & Co., 146-C, Shamaldas Gandhi Marg, Bombay.) Price Rs. 15.

Tamil Nadu has a Shops and Establishments Act and that is of the year 1947 The Bombay Act is a year later. These Acts form a piece of social legislation. The Bombay Act is designed to prevent overwork and consequent adverse effect on the health of the employees within its purview. This is sought to be achieved by provisions covering working hours, rest, measures for health and safety payment of wages and leave salary. No attempt to regulate the relationship of master and servant is made. The Act applies to shops, commercial establishments, hotels, restaurants, theatres and places of amusement and entertainment. The Act is applicable to the entirety of the present Maharashtra and Gujarat States. The Act applies the Payment of Wages Act and the Workmen's Compensation Act to the establishments coming within its ambit. The enforcement of the Act is left to municipalities and local authorities. For 30 years there has been no major amendment to the Act. But recently a Bill has been introduced to amend the Act with a view to plug the loopholes brought to light in the working of the Act. Hitherto a distinction had been maintained between professional activity and activity of a commercial character as a result of which the liberal professions like law and medicine were regarded as outside the purview of the Act. The recent Amending Bill has expressly included within the definition of 'commercial establishment', the legal, medical and other establishments.

The book under notice gives the complete text of the Bombay Shops and Establishments Act, 1948, and the Rules and Notifications issued from time to time. It provides sectionwise annotations in the light of relevant case law. The texts of the Maharashtra Shops and Establishments (Amendment Bill (XXVI of 1977) and the Gujarat Shops and Establishments (Amendment) Act (XXVI of 1977)

amending the Bombay Act are set out in Appendix B and Appendix C respectively. The book is a welcome publication useful to owners of shops and establishments, the enforcement machinery, employees, lawyers and students particularly in the State of Maharashtra and Gujarat.

VI DRAFTING, CONVEYANCING AND PLEADINGS by *Dr. G.M. Kothari*, 1977. (Publishers : N.M. Tripathi (P.) Ltd., Bombay) Price Rs. 60.

Drafting of documents and pleadings in Courts and Tribunals call for high legal acumen and form an important sphere of advocacy. It is said that if the draftsman has been exact and clear and brief he has done well. And according to Du Parcq, L.J., it often happens that important decisions turn on one word and it is as well that draftsmen should bear that fact in mind *Dickinson* v. *St. Aubyn*, (1944) K.B. 454 at 459. Similarly if pleadings are inartistically drafted and the Court is not able to approach the real issue as the real contention between the parties is not brought out, the Court would be justified in doing justice on such basis as it thinks fit (*Surendranath Sud* v. *Standard Vacuum Oil Company*, A.I.R. 1977 S.C. 1454.) Good drafting can come however, only with long practice in applying the theoretical norms on the subject.

The present book consists of 16 chapters. The first eight chapters deal with drafting of documents and deeds. The other eight chapters are devoted to pleadings including drafting of petitions and applications, drafting of writ petitions and appeals to the High Court and Supreme Court. The book incorporates a chapter on Professional Ethics to meet the requirements of the law students in the final year of the law course. About 300 forms and precedents relating to most of the important and frequently used documents are selected to serve as a ready reference work of day to day value.

The author has adopted a practical and pragmatic method of case studies and legal craftsmanship in dealing with draftsmanship of different kinds of deeds and pleadings and has, on the whole, achieved a just balance between principles and applications. The author's approach has been influenced by background of the English law of Property as is seen from chapters 2 and 3. His use of terms and terminologies like 'real estate' 'messuages' 'coverts of woodland' 'advowson and glebe' etc., is rather out of tune in the context of contemporary Indian life. At page 79 in clause (*j*), presumably the reference to the Hindu Marriage Act, 1954 is a mistake for the Special Marriage Act, 1954, since a marriage under the former Act by a member of a Hindu joint family causes no disruption of the joint status. The book is a welcome publication. It should be of great assistance to the members of the bar, law students as well as to litigants, in short to law-men and laymen alike.

VIII. THE IMPORTS AND EXPORTS (CONTROL) ACT, 1947, by *Subodh Markandeya and Jhitra L. Bhadri*, 1977. (Publishers N.M. Tripathi Private, Limited, Bombay) Price Rs. 50.

The Imports and Exports (Control) Act which is in force throughout India is an important economic legislation. The extent and degree of control vary with and depend on the country's total economic and industrial development at a particular time. In a developing country like ours unfettered import is out of the question. We cannot afford to have an adverse balance of payment. Factors like the shifting pattern of international trade, existence of various monetary systems, revemping of long range priorities periodically in response to conflicting claims, changing consumerist needs of industry and commerce have made problems of export and import complicated. The importance of the subject can be gauged by the fact that the aggregate value of imports and exports is more than 1500 crores of rupees per year.

The control of imports goes back to the time of the second world war. By notification under the Defence of India Rules of 1939, imports of 68 commodities were regulated. Many such notifications were issued from time to time and a consolidated notification covering quite a wide range of commodities was issued in 1943. When the Defence of India Rules lapsed on the conclusion of the second world war the restrictions were kept alive by the Emergency Provisions (Continuance) Ordinance, subsequently replaced by the Imports and Exports (Control) Act, 1947. The Act, originally enacted as a temporary measure, was made permanent in 1971. Very important amendments to the Act were made, by Act XII of 1976 based upon the recommendations of the Law Commission on Economic and Social Sciences. The provisions so added, namely, sections 4-B to 4-P and section 5-A imparted to the Act considerable force and vigour making it strict and effective in operation at the same time adding to its complexity.

The book under notice provides commentaries on the sections of the Act, The Introduction gives the historical background and the constitutional position of the legislation. The provisions of the Act have been explored and carefully examined. The relevant case-law has been considered and attention to the deficiencies and anomalies still found in the Act both from the view point of the authorities and of the citizen, has been drawn. An Appendix is provided containing the important statutory orders and notifications. The decisions in *Shah Poosali Mangilal v. The Secretary, Government of India, Ministry of Commerce*, A.I.R. 1976 Mad. 82, holding that the principles contained in the Policy Red Book have no statutory force so as to clothe any applicant for quota with a right to get it, and in *Madras Steelware Industry v. Joint Chief Controller*, A.I.R. 1977 Mad. 377, bearing on the scope of para. 292 of the Red Book (Import Trade Control, Hand Book of Rules and Procedure 1974-75) could also have been taken into account. On the whole, the book provides a lucid elucidation of the provisions of the Act in the light of relevant leading cases. The footnotes contain a wealth of information. On a not too familiar statute complex in its provisions, to have provided a comprehensive and useful commentary is a laudable achievement. The book should prove helpful to lawyers, judges, the concerned departments, and men involved in trade and commerce.

GOVERNMENT AS A LITIGANT.

By

V. LAXMANAN.

There is now much talk about the clearance of arrears and early disposal of disputes in Courts. The Government is seized of the matter and has turned its attention towards that to do its best. It has appointed the Law Commission, which is touring the country, to go into that question. But with all this I would like to pose a question to the Government (Central as well as State). The question is, what is the conduct of the Government as a litigant? It remains to be seen, whether as a litigant the Government has been of any help in clearing the arrears or has contributed to the accumulation of arrears.

To answer the question posed above, I wish to refer to the conduct of the Union of India as the owner of railways, for consideration because I have had occasion to watch its conduct as the counsel appearing against it in suits for compensation. (The Government referred to hereinafter is the Union of India owning the railways). As the biggest, I may even say, the mightiest, litigant the Government should set an example to others. It should be a model litigant worthy of emulation by others. But the truth seems to be otherwise, despite the fact that it enjoys certain privileges under the law.

The Government is treated differently from other litigant public. I wish to refer to the differential treatment given to the Government prior to the initiation of proceedings in a Court of law and thereafter. It is well-known that no legal proceeding can be initiated against the Government without issuing a notice under section 80 of the Code of Civil Procedure. Issuing a notice under section 80 of the Code of Civil Procedure is a *sine qua non*. Further, two months must elapse before filing the suit; so a suit filed against the Government may be dismissed if it is not preceded by a notice mentioned above. Similarly a suit filed after issuing a notice can be also dismissed if it is filed before the expiry of two months. This illustrates the imperative nature of section 80, Civil Procedure Code.

Now let us assume that a party issues a notice under section 80 of the Code to the Government. The Supreme Court enunciates the object of such notice in the following words: "The object of the notice contemplated by that section is to give to the concerned Government and public officers opportunity to consider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation, and the Government and public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations". So the party sending the notice will be expecting a reply in the fond hope that his claim may be settled. But usually what happens is that either no reply at all is sent by Government in time or the reply sent is merely an acknowledgment of the receipt of notice. The reply would also be very crisp. It will read: "Received your notice. It is under consideration". The reply is important because once the notice is issued it means the ball is set in motion and the legal process has started to move. But no 'considered' reply will be sent till the expiry of two months. Instances are not wanting where considered replies to the notices were sent after one year. Is not the time sufficient to reply? Is it not their duty to reply in time especially when they know that after the expiry of two months a suit will be filed against them? The reason seems to be that they do not take serious note of the notice. The delay can be attributed only to callousness and indifference.

The party sending the notice, failing to receive any definite reply, will have no other choice but to file the suit after the expiry of two months, unless the law of limitation permits him to wait for some more time. So much prior to the institution of suit.

The suit is filed. The Government Pleader, (the railways have their own counsel) appears on behalf of the Government, files a memo. of appearance and takes time "to answer the plaint". Now we come to the differential treatment extended to the Government after the institution of suit. Rule 5 of Order 27 of the Civil Procedure Code provides: "The Court in fixing the day for the Government to answer the plaint *shall allow not less than three months time* from the date of the summons for the necessary communication with the Government through proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the Government and may extend the time at its discretion". But rule 1 of Order 8, dealing with any other defendant says". The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence". Thus we find that while the Government is given three months' time to answer the plaint no such time is given to the ordinary defendant. Without going into the question whether there is any justification for such a provision or not we will see whether the answer to the plaint is filed within the time allowed. It will be a wonder if the statement is filed within time. The three months time will not be sufficient for them and the counsel will go on asking for further extension of time even to the extent of irritating the Courts. The Government will take another 6 months or one year.

At long last the grand day dawns when the Government chooses to file its statement of objections. The statement is filed. It makes interesting reading to those who care for technicalities. The Government always finds it convenient to raise some technical defence either under substantive law or procedural law, but more often under procedural law and a defence under section 80 comes in handy. The Government would try to build up a defence based on section 80, Civil Procedure Code, ignoring the very legislative intention (quoted supra) behind it. On facts the party may have a good case against the Government but there might have been some lapse in observing a technical formality and here lies the trap for him. The Government would not hesitate to use the trap whatever be the merits of the claim of the party on facts. I do not say that the Government should concede all the claims against it even if there be technical bars. What I mean to say is that the Government should not stretch technicality too far. It should avoid taking umbrage under technical pleas.

The defence founded on section 80 may be that the notice is not valid or that the notice has not been properly served or that there is no identity of party or any other defence that could be raised only after some strain. One particular defence raised by the Government may be taken up to show how they bask under technical pleas and objections.

One of the defences usually raised is that there is no identity of party. That is, the person filing the suit is not the person who issued the notice and so the suit is not maintainable. This particular defence was raised in a case decided by the Kerala High Court *P. P. Abubacker* v. *Union of India*[1]. In that case a notice under section 80 was sent to the Government by "Kozikode lime centre", and the suit was filed by "Kozikode lime centre by the Proprietor, P. P. Abubacker". The Government took up a defence that there was no identity of party *i.e.*, the person filing the suit was not the person who issued the notice and so the suit was not maintainable. The matter ultimately came up for decision before the Kerala High Court. Justice V. R. Krishna Iyer (as the then was) has rendered an illuminating and instructive judgment. In the course of the judgment, he refers to the observations of the Supreme Court with reference to section 80 and they are:

"The object of notice under section 80, Civil Procedure Code is to give to the Government or the public servant con-

1. A.I.R. 1972 Ker. 103.

cerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of Court. The section is no doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim". *Beohar Rajendra Sinha* v. *State of M. P.*[2]

"........The purpose of law is advancement of justice. The provisions in section 80 of the Civil Procedure Code are not intended to be used as booby traps against ignorant and illiterate persons". *State of U.P.* v. *Sheo Prasad.*[3]

After making a reference to the observations of the Supreme Court the learned Judge makes his own observations and has given a direction to the Government as to the mode it should follow in contesing the claims against it. With reference to the technical defences raised under section 80 he observes:

"I may mildly add that in a welfare state such provisions must be construed in a kindly spirit". He further observes: "The idea is not to arm the Government and public servants with secret weapons but to behave in a straightforward way and settle up disputes when litigation could be avoided". In respect of the case on hand the learned Judge adds, "I am satisfied that no confusion of identity has been caused in the defendant and the present plea has served only to lengthen the litigation. It has landed the State in avoidable wastage of time and money—precisely the opposite of what section 80 was meant for. I hold the view that a technical objection which diverts the normal course of trial is like a forensic hijack which should be frowned upon when raised without substantial grounds on the merits, more so when the State puts forward such a place.

"......But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak Government shows a willingness to settle the dispute regardless of prestige and other lesser motivations of more private parties to fight in Court.

"The layout on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic showdowns where a reasonable adjustment is feasible and even offering to extinguish a pending proceeding on just terms, giving the legal mentors of Government some initiative and authority in this behalf". The idea underlying the present discussion cannot be better expressed than by the above words.

I wish to conclude with the words that a very useful purpose will be served if the conduct of the Government as a litigant undergoes a change on the lines indicated above. I am sure that such a change will go a long way in clearing the arrears, because the Government is the biggest, mightiest and the perpetual litigant.

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2. (1970) 1 S.C.J. 118 : (1969) 3 S.C.R. 955: A.I.R. 1969 S.C. 1256.

3. A.I.R. 1969 N.S.C. 7.

CONFLICTING DECISIONS AS TO MEANING OF DEBT IN DEBT LEGISLATIONS.

By

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The interpretation suggested by me in these columns under the heading 'Are costs decreed debts under the Tamil Nadu Act X of 1975'[1] and it was judicially so declared by Ramaprasada Rao, J., in *Govindaswamy* v. *Balakrishna Reddy*[2], proceeds on the reasoning, that in view of the difference in the definition of the word 'debt' under Act XV of 1975 and Act XVI of 1975 and the conspicuous omission of the word 'decree' in the earlier Act it is obligatory on the part of an agriculturist to pay his decree debts and he is not entitled to the benefits of stay during the existence of the Moratorium Act XV of 1975.

However, Balasubrahmanyan, J., in a subsequent decision of 7th March, 1977 has held in *Venkatavaradhan* v. *Janardanan*[3], that decree debts are also debts under the Act XV of 1975 and hence the execution of a decree against an agriculturist has to be stayed during the life of the Act XV of 1975. Explaining his view, Balasubrahmanyan, J., has also referred to the earlier view of Ramaprasada Rao, J., and brushed it aside as *'per incuriam'*.

It is not the purpose of this article to find out which of these two views is correct (for each has force in its own individual way!) but to look at them from a higher angle.

The High Court, being a Court of Record, is, bound by its own decisions. Ordinarily a single Judge is bound by the views of an earlier judgment as well as that of a Division Bench and Full Bench decisions (*Peregrino Rodrigues, in Re.*[4]) It is also the duty of the subordinate Courts to follow the views of the High Courts to which they are attached[5]. However, when mutually exclusive and collectively contradicting judgments are pronounced by the High Courts (however logical they may be) they will place the subordinate Courts 'with alternatives to choose' making judicial consistency impossible. This will also give rise to a situation wherein the Courts below may get over the judgments of the High Court, a position not desirable. In fairness, it should also be admitted that a single Judge has got limited power not to follow the views of a brother Judge. Such a situation can arise when the Judge deciding the subsequent case feels that the earlier view is *'per incuriam'*[6]. In the matter under review the earlier view was not followed by Balasubrahmanyan, J., because he felt that the earlier view of Justice Rao was *per incuriam* and did not go hand in hand with the general provisions of the Act.

It is significant to note that the concerned Ordinances of 1975, which were later converted into Acts did not originally contain any provision relating to chit liability. But the High Court held for the first time that 'chit liability is not debt'[7]. So amendments were subsequently brought to introduce sections 2 (*ix*) and 2 (9) in these Acts respectively expressly excluding chit liability from the purview of these Acts. In another case, (and in the absence of any express provisions), it has been held that an action to recover advance money paid is not a suit for recovery of debt[8]. Again mahar, even though arising out of a contract of marriage between two Muslims, is held to be not a debt[9].

1. (1975) 2 M.L.J. (Journal) 51.
2. (1977) T.L.N.J. 41 : (1977) 2 M.L.J. 466 : 90 L.W. 707 (Judgment dated 7-1-77).
3. 90 L.W. 376 : (1977) 2 M.L.J. 426.
4. I.L.R. (1945) Bombay 702: 46 Bom.L.R. 916; A.I.R. 1945 Bom. 173.
5. *Futtulal* v. *Parbati Kunwar* 42 I.A. 155 : 18 M.L.T. 61 : 29 M.L.J. 63 : A.I.R. 1915 P.C. 15 also see *Poomalai* v. *Annamalai*, A.I.R. 1944 Mad. 124: 56 L.W. 494 : (1943) 2 M.L.J. 515.
6. (1915) I.L.R. 42 Cal. 1140 : 30 I.C. 681; *Chaitram* v. *Bridhi Chand* referred to 54 C.W.N. 8 (from 50 years digest Vol. 12 Page 1669).
7. (1976) T.L.N.J. 375; *Arunagiri Chit Fund* v. *Mohd. Haneef.*
8. (1976) T.L.N.J. 419 : 90 L.W. 169 *Ponnammal* v. *Shanmugasundaran*.
9. (1976) T.L.N.J. 319 : (1977) 1 M.L.J. 255 : A.I.R. 1978 Mad. 27, *Syed Abbas Sahib* v, *Minor Musthivi Begum.*

In a very recently reported decision, the Madras High Court has held[10] that a person who has obtained the benefits under Act XXXVIII of 1972 claiming to be non-agriculturist, cannot again claim the benefits under Act X of 1975, as an agriculturist. In this case Ramanujam, J., has, applying the principles of estoppel held that a person who has once claimed debt relief as a non-agriculturist cannot again claim debt relief as an agriculturist under another law, even if he became an agriculturist subsequently. These go to show that neither the definition of 'debt' nor stay of proceedings can be said to be fixed.

When laws restrict the right of a person born out of contract, the interpretation more favourable to the person to whom damage is done is to be preferred. This is based on the principle of equity. 'Statutes which encroach on the rights of the subjects whether as regards person or property are subject to strict construction. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. If there is ambiguity as to the meaning of the section, inasmuch as it is a disabling section, the construction which favours the freedom of the individual (to contract) should be given effect[11]

In the matter under review there are two sets of interrelated legislations on the same topic of debt relief. Yet both of them deal with two different sets of persons, namely, agriculturists and indebted persons (non-agriculturists). Surprisingly and significantly there is admittedly a difference in the definition of the word 'debt' in Acts XV and XVI of 1975. So an interpretation of a collateral legislation with different wording has given rise to two possible views. Under these circumstances, in my view, Justice Balasubrahmanyan might have referred the matter to a Division Bench so as to put the controversy at rest. It is also significant that the Legislature has not brought in so far any change in the Agriculturists Relief Act contradicting the views of Ramaprasada Rao, J.

It is humbly submitted here that conflicting decisions of the High Court on a matter like this will in the long run create confusion in the Courts below.

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10. (1978) 1 M.L.J. 74: *Margachari* v. *Krishnaswami Mudaliar.*

11. Maxwell on Interpretation of Statutes 11th Ed. Page 275-276.

ASSETS REALISATION — COMPANY IN LIQUIDATION.

By

SEETHAARAAM.

A company is wound up for reasons more than one, on many occasions. Many are seldom re-constituted or re-started. Upon the winding up of a company an Official Liquidator is appointed. The process of winding up or the liquidation proceedings as is commonly called is carried out under orders of Court. Since the object of liquidation is to clear up the money affairs and especially to settle the account of a bankrupt estate, the most important item of work of the Liquidator of that bankrupt estate is, to firstly realise the assets of the Bankrupt Estate.

A company, be it/a Banking Company or a non-Banking Company, is not wound up only when it becomes a bankrupt company. It may be wound up for many other reasons contemplated under the Act. Here it would be necessary for us to know that there are basically two enactments under which Companies are wound up. A Banking Company is wound up under the provisions of the Banking Regulation Act, 1949 and a non-Banking Company is wound up under the provisions of the Companies Act, 1956.

In respect of a non-Banking Company which is wound up the Official Liquidator under the provisions of the Companies Act is appointed whereas in respect of a Banking Company the Court Liquidator, under the provisions of the Banking Regulation Act, is appointed. Though they are two different authorities, the primary nature of their duties is one and the same *viz.*, the realisation of assets.

Liquidation means the settlement of accounts of a bankrupt estate. Therefore the work of either the Court Liquidator or of the Official Liquidator does not end with the realisation of assets but also extends to the act of settlement of the accounts; the accounts of the creditors and the contributories.

In this study it is proposed to limit the area of activity to the first act *viz.*, the act of realisation of assets. It may be seen that unless the assets are realised there does not arise the question of settling the list of creditors and contributories and payment to them thereof. The work of realisation of assets involves many-sided activities on the part of the Liquidator and whether it is the Court Liquidator or the Official Liquidator the first duty is to realise the assets, that too, as speedily as possible.

The assets in a liquidation means the assets of a company when it was working and something more added when it comes into liquidation. To be enumerative, the assets to be realised include all the assets mentioned on the assets side of a balance sheet excepting for the last item *viz.* Miscellaneous Expenditure, like Preliminary Expenses and the share (call) amount *viz.*, the contributory liability for which orders have been passed by the Court. The assets to be realised are both moveable and immoveable assets. Full details of these properties are found in the balance-sheet of the company, the form for which has been prescribed both under the Companies Act and the Banking Regulation Act.

The balance-sheet of a Banking Company is more elaborate in its contents when compared to the balance-sheet of a non-Banking Company. This is specially so in the field of "Sundry debtors, loans and advances".

In order to provide legal help and to speed up the process of realisation both in the Companies Act and the Banking Regulation Act enabling provisions have been incorporated. Let us look at the provisions of the Companies Act, 1956. (*a*) We see, under section 456 the Liquidator takes possession of all the property, effects and actionable claims to which the company is or appears to be entitled. The use of the words "is or appears to be entitled", are noteworthy. The Liquidator can take possession of such properties which in his knowledge, though not complete, are believed to be the property of the company. For

this end the liquidator can call upon the prescribed judiciary to take possession of such properties. In this connection it is very important to see the provisions of sub-section (2) of section 456 which laws down that from the date of the order of winding up of a company all the property and effects of the wound-up company are deemed to be in the custody of the Official Liquidator.

In the light of this it is evident that the liquidator is given overriding powers in the matter of taking possession of the properties that belong to the company which is wound up.

The question of taking possession of the assets of the company arises only in respect of moveable and immoveable assets. The assets may be in the custody of some outsider, with or without reasons true or false, ascertainable or not. The property may be in the possession of a secured creditor, an alleged mortgagee, a decree-holder, a tenant or even an outsider.

In this process it is not for our consideration the case of a secured creditor who is or is not in possession of the property but who after valuing the security chooses to stand outside the liquidation.

The question of taking possession of the assets from sundry debtors is complete once the liquidator gets the possession of the books. It is also possible to get particulars of these sundry debtors once the statement of affairs is filed under section 454 of the Companies Act, 1956, with the liquidator.

Normally the liquidator gets an idea of the assets of the company from the following: (*i*) The books and records of the company; (*ii*) the statement of affairs; (*iii*) The balance-sheet etc., of the company filed with the Registrar of Companies; and (*iv*) the petitioning creditor if the winding up is on the petition of a creditor, contributory or an interested party.

Apart from the types of assets discussed above, in a liquidation proceeding, as mentioned earlier, a liquidator has to take into account the amount due to be collected, if any, from the contributories. Further he has also the amounts decreed against the delinquent directors or any other concerned person to be recovered under section 543 of the Companies Act, 1956.

In the process of taking possession of the properties and effects of the company, the liquidator is given assistance of several agencies and of many enabling provisions. A perusal of sections 453, 456, 468, 469, 477 and 479 of the Companies Act, 1956 would go a long away in this direction. It therefore settles down that the assets of all descriptions of a company wound up, vests with the liquidator of the company automatically whatever and wherever they are and excepting for a liquidator, none others can lay hands over the same. The provisions under the Banking Regulation Act, 1949 in this aspect are similar to the provisions under the Companies Act, 1956. A perusal of sections 39-A, 45-D, 45-E read with the provisions of the Companies Act, 1956 mentioned above, would make this clear. The Liquidator having taken possession of the assets and having obtained sanction of the Court under section 457 of the Companies Act, 1956 proceeds to realise the same.

The realisation of the fixed assets of the company is comparatively an easy process as there could be little objection from outsiders. It is the realisation of the other forms of assets *viz.*, the sundry debts, loans and advances, the contributory liability and misfeasance decrees that pose considerable problems.

It is seen that in the process of realisation from the sundry debtors etc. different procedures are followed by the Liquidators. Some of the liquidators file the list of debtors into the Court along with an application under section 477 (1) and (5) of the Companies Act, 1956. The Court thereafter summons the debtors. On the date of hearing, if a debtor on his examination admits that he is indebted to the company the Court decrees the amount payable in one or more instalments. In the case of contesting debtors, the Liquidator is directed to file a suit

under the provisions of the Civil Procedure Code. It is seen that the Court does not pass *ex parte* decrees against any debtor under these provisions.

Some other liquidators follow the procedure of issuing notices to the debtors, calling upon them to pay the amount due by them within a specified date. In cases of failure the question of filing a regular suit under the Civil Procedure Code is followed.

In respect of a Banking Company under the provisions of the Banking Regulation Act, 1949 the process has been made simpler by the introduction of section 45-D. This procedure is identical with the procedure followed by some liquidators under section 477 of the Companies Act, 1956. It is under the provisions of section 45-D of the Banking Regulation Act, 1949 even *ex parte* decrees are passed by the Courts.

It is a doubtful matter as to how far the liquidators are utilising the enabling provisions under section 446 (2) of the Companies Act, 1956 which is similar to the provision in section 45-B of the Banking Regulation Act, 1949, because in contested cases or proceedings under section 477 and in cases of non-payment after issue of demand notice, the liquidators follow the procedure of instituting suits against the debtors in the other Courts under the provisions of the Civil Procedure Code.

The act of obtaining a decree against the debtor and the execution thereof in case of non-payment, in terms of the decree, are time-consuming and laborious. The procedural and legal formalities involved therein are too tiring. It is of course not to complain as such against the procedure. The filing of suit, filing of counters, framing of issues, the number of adjournments, coming up of cross-claims, disowning of liability, examination, cross-examination etc. are too numerous and thus in most of the cases they delay the entire proceedings for several years.

In execution cases where the properties of the debtor are to be brought to book, there is the additional procedure for attachment, sale, etc. Invariably in those cases where some moveable or immoveable property is involved, the liquidator is faced with the problems of claims by outside parties, settlement of these claims, decrees, appeals therefrom to the High Court etc. etc. This process consumes an unimaginably long duration causing undue delay.

The position in respect of Banking Companies where the list of debtors is filed into Court under section 45-D of the Banking Regulation Act, 1949 is slightly different. There a decree is obtained against the debtor without much difficulty, but however the time consumed in the suits appeals execution proceedings, certificate proceedings and in the proceedings of cross claims, etc. remain the same. The point of difference in respect of proving of the debts between the case of Banking and a Non-Banking Company is that in the case of a Banking Company the documents of a Banking Company are deemed for all purposes to be evidence against the debtor, see section 45-F of Banking Regulation Act, 1949. The absence of such a provision in the Companies Act, 1956 acts as a great restraint to the Official Liquidator.

There is also one more point of difference existing between Banking and Non-Banking Companies in the matter of limitation. A perusal of section 458-A of the Companies Act, 1956 and section 450 of the Banking Regulation Act, 1949 would throw light on this aspect. Though the basic idea of liquidation of a company is to stop the company from further deterioration and to safeguard the interest of creditors and contributories, the balance weighing in favour of the creditors and contributories of a Banking Company is on the basis of small, poor deposit-holders. This aspect, how fully it justifies the discrimination, is still a debatable point as basically the creditors are creditors whether of a bank or of other company in liquidation.

As between the obtaining of a decree and its execution, the latter is more tedious and more time-consuming. Many a time because of miscellaneous claims,

counter-claims or title suits etc. and appeals therefrom, the decree stands as decreed for years and years. It also happens that in certain cases the entire case is called back and re-started.

It is necessary that a time-limit, or a stage limit is placed in a suitable way to limit the multiplicity of the proceedings in liquidation. The appealable limit and a time-limit for entertaining counter-claims should be placed. While considering the question of huge arrears in various High Courts and the Supreme Court the Central Government has come out with one such suggestion in a general way.

In the case of decrees obtained by Banking Companies in liquidation under section 45-D of the Banking Regulation Act, 1949 the decrees are executed through the certificate officers as these decrees could be realised as arrears of land revenue. But it is interesting to note that though the liquidator files the certificate with the concerned Certificate Officer requesting him to realise the amount as an arrear of land revenue under section 45-T of the Banking Regulation Act, 1949, it has been the experience that the concerned Revenue Officer does not proceed to realise the debt in the said way. On the contrary, he starts proceedings like a civil Court and follows all the procedures of the Civil Procedure Code. The Revenue Officer does not discriminate between the certificate filed before him by a Court Officer and others and does not also take into consideration that the certificate filed by the liquidator is on the basis of a decree passed by the High Court under its original jurisdiction. The very purpose and the object of section 45-T is lost as the certificate debtor takes advantage of the proceedings followed by the Certificate Officer and brings in all the defences under him including the denial of the debt and prefering claims and counter-claims. Many a time many miscellaneous suits and title suits are preferred and stay of certificate proceedings obtained. When this situation is allowed the very purpose of speedy winding up proceedings is lost. It is in fact necessary, that, wherever defence is offered in those proceedings only an appeal against the High Court's decree should be filed and no other proceeding entertained.

SUGGESTIONS.

1. At present, the provisions of the Indian Companies Act, 1913, are applicable in respect of companies winding-up prior to 1st April, 1956, the date from which the Companies Act, 1956, came into force. It is seen that there are many enabling provisions incorporated in the Companies Act, 1956, which have a better effect as compared with the Indian Companies Act, 1913. The Rules framed by the respective High Courts under the provisions of the Indian Companies Act, 1913 vary from Court to Court. In view of this treatment there are practical difficulties encountered both by the Official Liquidator and also by the Court Liquidator in conducting the winding-up proceedings of the companies in liquidation by following different procedures. It is therefore suggested, that in order to speed up the winding up proceedings and also to have a uniform procedure followed by all the Liquidators in respect of all the Companies in liquidation, the question of differentiation in the application of the provisions of the Indian Companies Act, 1913 and the provisions of the Companies Act, 1956, should be done away with. It would therefore be necessary to amend the provisions of section 647 of the Companies Act, 1956.

2. In respect of the decrees obtained by the Liquidators it would be highly necessary to have a suitable provision in the Act so that the properties of the debtor whatever they are and wherever they are, stand attached automatically as and from the date of the decree. In so far as the debtors appearing in person, in the Court before the passing of the decree, they should be directed by the Court to file by means of an affidavit the list of properties owned by them. This would safeguard the question of realisation by the Liquidators as otherwise it is very likely that the debtors dispose of their properties between the date of decree and the date of attachment etc, unless otherwise there is an attachment of the pro-

under the provisions of the Civil Proce- In this connection the provisions under the Public Demands Recovery Act are worth considering.

3. The Official Liquidator obtaining decree against the directors in the case of misfeasance should be enabled to have the facility of having an attachment on the properties of the directors concerned as suggested above in the case of debtors and also against the legal representatives of deceased directors.

4. There should be a bar prescribed under the Act beyond which a matter in winding up can be taken up in appeal by the debtors, directors and contributories against whom a decree for money has been obtained. In this connection the provisions of the Public Demands Recovery Act, where a limit of this kind has been prescribed may be considered. In this connection it is worth considering the suggestion thought of by the Ministry of Law of the Government of India in the matter of speedy disposal of the large volumes of pending cases in several High Courts and in the Supreme Court.

5. While section 45-T of the Banking Regulation Act, 1949, provides for recovery of the amount due as an arrear of land revenue no procedure has been prescribed under the said section. In the absence of such a procedure the Collectors are proceeding on the lines prescribed under the Public Demands Recovery Act or the procedure prescribed under the Civil Procedure Code, 1908. This step is in no way beneficial and it is in no way helpful to speedy winding up proceedings. It is therefore necessary that separate rules are provided under this section or that the section itself is amended to provide for the details in regard to service of notice, sale and the matter of appeals. Over and above these, there should also be a time-limit prescribed within which the entire certificate proceedings should be completed subject however, in special cases where the Collector has to obtain special sanction from the higher authorities for continuing the certificate proceedings beyond the said period of one year.

6. Section 45-C of the Banking Regulation Act has to be amended to bring the same in line with section 446 of the Companies Act, 1956.

7. Section 458-A of the Companies Act, 1956 should be amended so as to be in line with the provisions of section 45-O of the Banking Regulation Act, 1949.

8. A suitable provision, in line with the provisions of section 45-F of the Banking Regulation Act, 1949, should be introduced in the Companies Act, 1956.

9. Provisions of the Companies Act, 1956 should be so amended as to enable the Official Liquidator, to obtain decrees on the lines on which decrees are obtained under section 45-D of the Banking Regulation Act, 1949 by the Court Liquidator.

DELETION OF CLAUSE (2) IN SECTION 47, CIVIL PROCEDURE CODE.

By

T. S. SUBRAMANYA IYER.

Much has been said about the need to reduce the cost of litigation, and also quicken the disposal of cases. This is with a view to make justice cheap enough, even for the poor and to obviate the criticism, that justice delayed is justice denied. But in actual practice and the working of the procedural law, we find that we are going in a reverse gear. This may be illustrated by the recent amendments of the Code of Civil Procedure by Act CIV of 1976, at least or at any rate in section 47 of the same. Section 47 provided a cheap and quick remedy by sub-clause (2) as it stood before the introduction of the amendment in the following terms *viz*., "The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may if necessary, order payment of any additional Court fees". This was a very wholesome, and salutary remedy for all cases in execution, however complex or trivial in nature. On an order passed erroneously by the executing Court, be it trifling or otherwise, you could immediately take the matter in appeal to the appellate Court, generally the District Court. A petition to set aside a sale allowed or dismissed could be brought to the appellate Court. The Court fee for the appeal in such a small amount is merely one rupee. In another case like where excess property of a defendant is sold in execution and delivery ordered etc., the matter could be appealed. We have a crop of cases now under the Debt Relief Acts coming under section 47 such as stay of execution etc. And there may be ever so many conceivable instances coming within the terms, "All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to execution, discharge or satisfaction of the decree........" which are dealt with in the lower Court that could be taken on appeal by the aggrieved parties.

Now by deletion of the above-mentioned clause (2) no appeal could be filed against an order passed in execution by the executing Court. The cheap quick remedy is taken away and one will have to take the matter in revision only to the High Court in the metropolis. And a revision to the High Court though it may be handy and possible in the hands of rich litigants, is certainly a very costly one to the poorer sections. The real sufferers on account of the above amendment are the large segment of people, the poor litigants in mofussil stations who probably have to deal much with section 47, Civil Procedure Code. The work in the District Courts already reduced by taking away the revisional jurisdiction in Rent Control cases, would be still further diminished if appeals coming under section 47 are also deprived. The amendment therefore virtually takes away by the left hand what is given by the right. I am afraid that the amendment of section 47 in a great hardship to many a litigant. Not being well conceived or considered, I believe it would be proper and just that the deleted clause should be reintroduced. It may not be out of place here to quote what a former Chief Justice of the Supreme Court; Mr. S. M. Sikri in his inaugural address in 1971 to the Punjab and Haryana Bar said: "I have never appreciated why Governments want to treat administration of justice as a commercial venture and derive profit from it. This must stop. If it does not, the public should be made aware of it".

RECRUITMENT, APPOINTMENT AND SERVICE CONDITIONS OF THE EMPLOYEES OF MADRAS CITY CORPORATION UNDER MADRAS CITY MUNICIPAL CORPORATION ACT (IV OF 1919).

By

R. THILLAI VILLALAN, MADRAS.

The failure to frame bye-laws under section 349 of Madras City Corporation Act of 1919 by the Council is not only coming in the way of maintaining discipline and controlling the conduct of the Class III and Class IV employees of the Corporation Establishment but also in regard to the method of recruitment, appointment, promotion and service conditions.

For this purpose, we have to look mainly to four sections of the Act, *i.e.*, sections 85, 86, 93, 349 (2). Section 85 (*c*) runs as follows:—Every appointment to any post included in Class III or Class IV shall be made by the authority specified in sub-section (2) of section 93. Section 86 (1) states that save as otherwise provided in that Act, the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the Corporation Establishment shall be .... (*ii*) in the case of employees included in Class III and IV be bye-laws made by the Council under section 349.

Section 93 (2) runs as follows:—Save as otherwise provided in that Act, appointment to all posts in Class III and Class IV under the Corporation, the pay or the maximum pay of which exceeds one hundred rupees per mensem, shall be made by the Commissioner from the list of candidates approved by the Appointments Committee and in the order of preference indicated in the list. Appointment to all other posts in Class III and Class IV under the Corporation shall be made by the Commissioner subject to the bye-laws made by the Council.

Section 349 (1) provides:—The Council may make bye-laws not inconsistent with that Act or with any other law to provide (1) for all matters expressly required or allowed by this Act to be provided for by bye-law.

A dispute regarding promotion of non-Graduate Upper Division Clerk and Graduate Upper Division Clerk as Section Manager in theratio 4 : 1 fixed by the Appointment Committee but not approved by the Council came up before Ramanujam, J., in *K. Ramamurthy* v. *The Corporation of Madras by its Commissioner, Ripon Buildings, Madras and another.*[1]

The contention of the petitioner as regards the fixation of ratio of 4 : 1 as between the non-Graduate Upper Division Clerks and Graduate Upper Division Clerks is that the said ratio has been fixed only by the Appointment Committee without the requisite sanction of the Council and therefore, it has no validity in law. Reference was made by the learned counsel for the petitioner to sections 86 and 93 of the Madras City Municipal Corporation Act, 1919, to substantiate his plea that in the case of employees in Class III (which comprises the Section Managers), the Council alone is authorised to make rules or by-laws regarding the classification of service, methods of recruitment and conditions of service and pay and allowance and discipline and conduct and that the Appointment Committee has no power to prescribe a ratio between the non-Graduate Upper Division Clerks and others for the purposes of promotion to the post of Section Managers.

1. (1977) 1 M.L.J. 116.

The learned counsel appears to be right in the said submission. Section 86 (1) (*ii*) says that in the case of employees included in Class III and Class IV, the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the members of that class are to be regulated by by-laws made by the Council in exercise of its powers under section 349 which specifically enable the Council to make by-laws not inconsistent with the provisions of the Act or with any other law to provide for all matters expressly required or allowed by the Act to be provided for by by-laws. Section 93 provides for the constitution of an Appointments Committee and has not given the power to frame by-laws or regulations regarding the principles for recruitment or for promotion. The principles have to be laid down by the Council acting under section 349 while the Appoinment Committee makes selection on the basis of those principles and sends proposals to the Commissioner who is the appointing authority.

In this case, admittedly, it was not disputed that the formula of 4 : 1 between the non-Graduate Upper Division Clerks and Graduate Upper Division Clerks in the matter of promotion was laid down by the Appointment Committee. But this was not placed before the Council for sanction. As already pointed out, all matters relating to the classification, recruitment conditions of service, pay and allowances and disciplinary conduct have to go before the Council. Since the said ratio 4 : 1 prescribed by the Appointment Committee, did not have any sanction or approval of the Council as required under section 86 of the Act, the said formula has no legal basis.

When specifically asked whether the formula had the approval or sanction of the Council at any time, the learned counsel for the first respondent, the Corporation of Madras, submitted that the matter was never placed before the Council and its sanction obtained. Therefore, the ratio of 4 : 1 formulated by the Appointment Committee was only in the stage of proposal or suggestion and it cannot have and validity in law.

The learned counsel for the second respondent attacked the validity of the said formula of 4 : 1 on another ground as well. He submitted that as per the rules prescribed for promotion to the post of Section Managers from Upper Division Clerks, only graduates are qualified, that non-Graduates cannot at all seek promotion to the post of Section Managers and that the ratio 4 : 1 fixed by the Committee contravened the rules. In support of this submission, he referred to paragraphs 1015 and 1021 of the Madras Corporation Code. Paragraph 1015 provides that for promotion to the post of Section Managers and Head Clerks, a degree of the Madras University is essential. Paragraph 1021 of the Madras Corporation Code which deals with promotions in the indoor establishment, however, proceeds on the basis that in addition to the graduates, non-graduates who have put in not less than 10 years of approved service as Upper Division Clerks are also eligible for promotion. The contention of the learned counsel for the second respondent that only graduate Upper Division Clerks can seek promotion to the post of Section Managers cannot therefore be accepted. But it was unnecessary to go into the said submission of the learned counsel for the second respondent in detail, as the ratio of 4 : 1 had to be held invalid in any event. Therefore, the formula laid down by the Appointment Committee fixing a ratio of 4 : 1 in the matter of promotion to Section Managers from amongst the non-Graduate Upper Division Clerks and Graduate

Upper Division Clerks was held to be bad for want of sanction of the Council. The relief claimed by the petitioner in the writ petition was to quash the order of the first respondent, dated 6th February, 1975. According to the petitioner, this impugned order was based on the ratio of 4 : 1. But the impugned order did not indicate that it was based on the said ratio; it merely appointed two individuals to the posts of Section Manager. It is not known whether this was been done in pursuance of the ratio of 4 : 1 or whether it had been done in pursuance of paragraph 1021 of the Madras Corporation Code which makes the post of Section Managers selection posts. The Section Manager's post has been treated as a selection post in paragraph 1021 of the Madras Corporation Code and it says that persons of real merit, efficiency and capacity irrespective of seniority are to be selected for such posts from the qualified persons. Though the petitioner may be a person qualified for promotion, he being a non-graduate with 10 years service as Upper Division Clerk he cannot claim promotion purely on the basis of seniority in view of the rule relating to promotion contained in paragraph 1021 of the Madras Corporation Code. It was not therefore possible for the Court to set aside the impugned order, dated 6th February, 1975. The ratio of 4:1 fixed by the Appointment Committee having however been set aside, the petitioner and the second respondent have to work out their rights, if any, before the first respondent.

The delay in framing bye-laws by the Council is the root cause for setting aside the ratio of 4 : 1 fixed by the Appointment Committee. But, in this case, the absence of consideration of one aspect is very significant, *i.e.*, the Upper Division Clerk or Graduate Upper Division Clerk is drawing salary in the scale of pay Rs. 250-10-300-15-450. The salary exceeds one hundred. If that is so, section 93 (2) empowers the Commissioner to appoint persons from the list of candidates approved by the Appointments Committee and in the order of preference indicated in the list without sanction by the Council. Here, the Appointment Committee indicated the order of preference by fixing a ratio 4 : 1 for the list of candidates to be appointed by the Commissioner. Only in the case of candidates who are drawing salary less than one hundred rupees and other cases, appointment shall be made by the Commissioner subject to the bye-laws made by the Council. This has to be rectified by way of review or appeal, if the Corporation has so chosen to work out the remedy.

Another interesting question is regarding the power of the Council of the Corporation in appointing in Class I-A and Class I-B and Class II employees of the Corporation. This falls under section 87 of the Act and came up before Ramaprasada Rao, J., in *S. Sarada and another* v. *State of Tamil Nadu, represented by the Secretary, Education Department, Madras*-600009 *and others.*[2]

Section 87 runs as given below:—87 (1) If a vacancy occurs in any office included in Class 1-A, Class B or Class II or any new office in Class 1-B or Class II is created, the Council shall within three months appoint any qualified and suitable person to hold such office. (2) If the State Government refused to confirm the appointment so made, the Council shall appoint some other qualified and suitable person within forty-five days from the receipt of the order refusing confirmation. (3) In default of any appointment being made in accordance with sub-section (1) or sub-section (2), as the case may be,

2. (1974) 1 M.L.J. 466.

the State Government may appoint a person who in their opinion, is qualified and suitable to hold the Office and such person shall be deemed to have been appointed by the Council. (4) Pending an appointment under sub-section (1) or sub-section (2) the Council may appoint a person to hold the Office temporarily and assign to him such salary as it may think fit. Provided always that the salary so assigned shall not exceed the maximum fixed by the State Government by rules in respect of the Office.

A post of Assistant Education Officer fell vacant in the Corporation. Long-after three months after the post fell vacant, the Council passed a resolution selecting the name of *P* for the post and *P* who was a B.T. Supervisor was appointed temporarily to the post pending approval by the Government.

However the Government acting under section 87 (3) of the City Municipal Corporation Act, appointed another person and reverted *P* from the post of Assistant Educational Officer. Aggrieved by the said order, *P* filed a petition for the issue of a writ challenging the said order. In the light of the statutory provisions, the contentions of parties may be considered. Normally if a statute prescribes a formal time-limit for the performance of a statutory duty without specifying any consequence, in default of compliance with such a mandate, then such a prescription is directory and not mandatory. It would be sufficient to refer to the following decisions which throw light upon the discussion on the point as to what is mandatory and what is directory. The leading case is that of the Privy Council reported in *Montreal Street Railway Company* v. *Normandin*[3] The principle therein stated is that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only and not imperative. In *Rattan Anmol Singh* v. *Ch. Atma Ram*[4] the Supreme Court said that when the law enjoins the observance of a particular formality, it cannot be disregarded and the substance of the rule must be followed. This principle was followed by the Supreme Court in *Baby Ram* v. *Smt. Parsanam.*[5] No doubt, that was a case which arose under the Representation of the People Act and an election contest was reviewed by the Supreme Court. Gajendragadkar, J., adopting the earlier observations of the Supreme Court in various cases made a distinction between defects which are of a substantial character and those which are not of a substantial character. In essence the Supreme Court has repeatedly said that when a statute prescribes a mandate, may be in relation to time within which the statutory functionary should act or may be it relates to any other formality, such a mandate ought to be complied with if the non-observance of it would cause a serious defect and would enable the statutory authority to act in any manner it likes. It would be encouraging intransigence on the part of the statutory functionary if it were allowed lightly to disregard prescriptions made by the statute regarding the manner of exercise of power and particularly in a case where a consequence is provided in the Act itself

3. (1917) A.C. 170.

4. 1954 S.C.J. 731: (1955) 1 S.C.R. 481: (1954) 2 M.L.J. 435: A.I.R. 1954 S.C. 510.

5. 1959 S.C.J. 42: 1959 S.C.R. 1403: A.I.R. 1959 S.C. 93.

in case the peculiar prescription as to time, as in this case, is not observed. In the language of the learned Chief Justice in *Guruswami Reddiar* v. *Secretary, Regional Transport Authority, South Arcot* [6], where a statutory provision prescribes a time-limit for doing a certain thing it is always a matter of construction whether its consequence is one of inhibition. The provisions of the statute themselves may give an indication. In other cases, the circumstances of the situation, or the justice of the matter may have a bearing. Therefore, in a case where a peculiar consequence is expressly provided for in the statute itself, then the general consideration as to whether the non-adherence to the rule would lead to injustice or affection of right of third parties are considerations which are really alion to the problem. Therefore, if a statute, having regard to the objects for which its provisions relating to the appointment of officers to the establishment of the Corporation are concerned, says that a vacancy should be filled up within a period of three months by the Council and if it also provides that in default of such an appointment by the Council the State Government can intervene and act on their own and make the appointment, then this consequence makes it clear that the prescription as to time is not purely directory but is obligatory.

I may also refer to a decision of the Supreme Court in *Raja Buland Sugar Company Limited, Rampur* v. *The Municipal Board, Rampur*[7] which deals with such a proposition:

> "The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word 'shall' is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for the purpose the object of the statute in making the provision in the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general incovenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory".

In the instant case, therefore, it has to be seen whether a serious genaral inconvenience or injustice to persons has been done. The writ petitioner was aware that she was only appointed temporarily to the post pending approval by the competent authority. This by itself shows that the writ petitioner had no right to the post for her to seek for the discretionary relief under Article 226 of the Constitution. It is only in a case where there is an infringement of a vested right that a person can be said to be inconvenienced or affected. But when the said right which is agitated is incomplete and not vested, then the person who seeks for the enforcement of such an inchoate right obtained by her cannot be said to be an aggrieved person. In the present circumstances it cannot be said that any public inconvenience or much less any inconvenience to the writ petitioner has occurred. She was occupying the post temporarily knowing fully well that she should quit the Office if the Government does not approve of the resolution of the Council. The principles enunciated by the Supreme Court that in case where a general inconvenience

6. W.A. No. 1 of 1973.
7. (1965) 1 S.C.R. 970: A.I.R. 1965 S.C. 895.

has to be averted the situation created by the irregular exercise of power by a statutory functionary has to be winked at and tolerated does not squarely apply to the instant case.

In the decisions the proposition is well-established that a bare prescription as to time without furthering the intention by providing any consequence in case of non-compliance with the same has always been understood not as a mandate, but as a directive which is excusable and tolerated because it is of no consequence. But if on the other hand the prescription as to time is a well thought of directive coupled with a duty to act accordingly, then such a rule as to time has to be understood as a mandatory rule.

Section 87 (1) has to be read with section 87 (3). Sub-section (1) of section 87, no doubt, barely refers to a rule of time within which the Council has to act and fill up a vacancy occurring in the Office enumerated in that sub-section. Sub-section (3) however provides for the consequence in case where the Council fails to act within the time prescribed. The language of sub-section (3) is a pointer for interpreting the intention of the Legislature as to whether the rule as to time is directory or mandatory. If the Council makes a default in filling up a vacancy occurring in Class II Office, with which we are concerned, and so act in accordance with the prescription as to time, the residuary power to appoint a person who in the opinion of the State Government is qualified and suitable to hold the office springs automatically and and if an appointments is made such a person shall be deemed to have been appointed by the Council. This consequence projecting the residuary power in the State to act in default has a special significance as it has an impact on the real meaning and intent of the expression "shall within three months appoint" appearing in sub-section (1) of section 87. If no such appointment is made, then in the popular as well as in the legal sense a default has been made in the matter of appointment in accordance with sub-section (1). Thus reading sub-section (1) in conjunction with sub-section (3), a meaningful purpose in the matter of appointment of Offices in a vacancy in the specified officers appears. Even the marginal note is indicative of such a purpose. It speaks of the time within which a vacancy in certain posts must be filled up. Though, no doubt, marginal notes are not valuable guides for interpretation, they can certainly act sometimes as a basis to interpret. The word 'default' in sub-section (3) has to be understood as an omission. In *Fakir Chunder Dutt* v. *Ram Kumar Chatterjee*[8] the word 'default' was understood grammatically as a failure to perform. It is one of the cardinal rules of interpretation that the plain and grammatical meaning of the words in a statute should first be thought of before adopting any other meaning which is not ordinary and popular unless there is an ambiguity in its meaning or there are compelling circumstances leading the Court to adopt such a meaning. I do not find any such extraordinary circumstances in this case to interpret the word 'default' in sub-section (3) of section 87 in a manner other than ordinary. Understanding the word 'default' as an omission, the question is whether the verb 'shall' in sub-section (1) has to be still understood as merely directory or as 'may'. I have already referred to the salient principle that if a power is coupled with a duty, then such coupling makes the exercise of power a compulsory event and does not vest in the authority invested with such power a discretion to act as it pleases or beyond

8. (1904) I.L.R. 31 Cal. 901 at 908.

the directive, which is to be understood as a mandate annexed to the exercise of such a power. If the Council fails to appoint a qualified and suitable person to hold the Office in case any vacancy occurs in it within three months from the date of the occurrence of such vacancy in accordance with section 87 (1) then it appers to me that the residuary power of the State Government to act and appoint a suitable person of their choice is unquestionable as it is automatic.

The Supreme Court has repeatedly held that if a statute lays down the *modus operandi* for the statutory functionary to act and if the pattern and manner of such acting is clearly set out, then no other mode of effectuating the intention of the Legislature is available to such a functionary.

In our case the Legislature has designedly provided a pointer in a case of an omission on the part of the Council to appoint within the prescribed time. If that is the basis for the challenged order and the State acted under section 87 (3) and exercised their power to appoint the 3rd respondent after noticing the default committed by the Council, it cannot be said that they acted without jurisdiction or that the order impugned poses an apparent error of law or any other apparent error.

As the appointment of the writ petitioner was not made within three months from the date when the vacancy occurred, the Council made an initial mistake in selecting her even though the 3rd respondent was senior to her in service. As a matter of fact, the record discloses that the merits of all the candidates considered by the Council and by the Government were equal. The salient principle of selection is that if everything is equal as between the competing candidates then the seniormost has to be selected. This was also not borne in mind by the Council when it made the appointment beyond time. These factors were borne in mind by the Government when it acted under its residuary powers under section 87 (3) of the Act and appointed the 3rd respondent to the post.

W.P. No. 1459 of 1973 (1973):—The point for consideration in this writ petition was very simple. The writ petitioner had been appointed by the Council as a reliever in case any vacancy arises in future. Such an appointment is not squarely within the meaning of section 87 (1) of the Act. The vacancy contemplated in section 87 (1) is not an expected or anticipated vacancy but a real vacancy. The writ petitioner was appointed as substitute in leave or any other vacancy that may arise. It is therefore clear that as on the date of appointment she was not to fill up a vacancy which had arisen before three months from the date of appointment. It is only to enable the writ petitioner to act in the contingency of a leave vacancy or any other similar vacancy arising that she had been appointed as a stop-gap measure for purposes of continuity and eventually in public interest. Probably this was done by the Council in exercise of its rights as a primary administrative body functioning under the Act. The State Government interfered with such a decision of the Council treating it as if it was an appointment made under section 87 (1) and by providing for themselves power to act under section 87 (3). As I said, the appointment of the writ petitioner by the Council is not under section 87 (1) and it cannot be. In snch circumstances, the residuary power under section 87 (2) or (3) is not available to the State Government to set aside such an administrative order of the Council. Whatever power the State Government may have otherwise under the provisions of the Act, it has no power to disturb that order, under the guise of exercise of power under section 87 (3). The impugned order

expressly says that the appointment of the writ petitioner is as a relieving officer and not as an officer who would permanently fill up a post which has fallen vacant. As the appointment cannot be interpreted to be one under section 87 (1) the State Government cannot assume power under section 87 (3) to set aside that order, in this behalf there is an error apparent, in so far as the appointment of the writ petitioner for the purpose as above has to be sustained as the State Government has exercised jurisdiction when it has none under section 87 (3) and in this behalf there is an error of law apparent on the record. I may incidentally add that the State Government while passing the challenged order did not expressly refer to the appointment of Sarada to fill up leave vacancies. But the Corporation of Madras obviously understood the order of the State Government in that way. There is no disturbance of that part of the Council's resolution by the State Government in so far as Sarada is concerned. Viewed in this light the petitioner cannot complain. But as the order has been understood by the Corporation of Madras so as to deprive her of the right to act in the leave vacancy though she has been appointed as such by the Council in exercise of its authority as the administrative functionary in the Corporation, she has come up to this Court. It is in this perspective that she is entitled to relief.

In this case, Government came into the scene after nearly six years. Action or inaction in framing bye-laws or filling posts within the statutory period will affect the employees in a very drastic manner. This aspect has to be borne in mind by public bodies when they are dealing with the life-problem of the nerves of their Establishment.

"JUSTICE TO THE POLICY-HOLDER" UNDER SECTION 39 OF THE INSURANCE ACT IV OF 1938.

By

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The recent discussion appearing in '*The Hindu*' under the title "Justice to the policy-holder" has prompted me to address myself to an allied subject in the realm of life insurance, the same being.

"Title and right, to the policy amounts of life assured under section 39 of the Insurance Act IV of 1938".

The effect of section 39 of the Act, (in this discussion reference to the Act will mean the Insurance Act IV of 1938), on the right of the nominee to the policy amounts, is not free from difficulty. I am confining my discussion to the limited question of the right of the nominee as against the heirs of the deceased, life-assured, under the above section. As per the provisions and the scheme of the Act, in this regard, sections 38 and 39, deal with assignment and transfer of insurance policies, and nomination respectively by the policy-holder. The above two sections, present a complete self-contained code, in regard to the devolution and distribution of the policy amounts, in certain contexts, provided for, in them. Assignment *simpliciter* of the fruits, under the policy does not require elucidation, since there is not much of controversy, in regard to the absolute title of the assignee, in such cases over the amount.

But the same cannot be said of nomination prescribed under section 39 the Act. What is the rationale and object behind such a provision, *viz.*, the process of nomination by the policy-holder, its legal effect and basis? The policy-holder is desired to make an election, among his near and dear and asked to name that person or persons, so as to have that name specifically enshrined in the policy itself to secure to him, by payment, the amount under the policy, after it matures for payment, in the event of the death of the life assured. Nomination is revokable. There is no fetter on the life assured, to cancel a nomination and nominate another in the place of the prior nominee, in contra-distinction to assignment which becomes unalterable and operates as a transfer *inter vivos*.

In what manner has this nomination to be understood? How has it been actually interpreted and followed by Courts? If it does not conform to accepted norms, what are the remedies open? It shall be my endeavour to discuss and answer the above points, in this paper.

Section 39, is itself divided into seven sub-sections, with two provisos. I am not dealing here with the effect of sub-section 7, which attracts section 6 of the Married Women's Property Act, 1874. Untramelled by judicial decisions, and inhibitions attendant on such case law to which I shall advert later, let me first extract the relevant sub-sections of section 39 and deal with their purport, import and interpretation, on well-settled principles.

Sub-section (1) reads:—

"*The holder of a, policy of life insurance on his own life, may*, when effecting the policy or at any time, before the policy matures for payment, *nominate the person or persons to whom the money secured* by the policy, *shall be paid*, in the event of his death."

Provided that, where a nominee is a minor, it shall be lawful for the policy-holder, to appoint in the prescribed manner, *any person to receive the money*,

secured by the policy, in the event of his death, during the minority of the nominee."

Sub-section (5) is as follows:

"Where the policy matures for payment during the life-time of the person whose life is insured, or where the nominee, or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy *shall be payable to the policy-holder or his heirs* or legal representatives, or the holder of Succession Certificate, as the case may be."

Sub-section (6) reads to the following effect:—

"Where the nominee, or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, *the amount* secured by the policy *shall be payable to such survivor or survivors*."

The meaning and interpretation, to be put on the above clauses will clinch the position and the rights of the nominee to the amount secured under the policy.

The following is an accepted rule of interpretation of a statute, that, where there is a specific statute on a specific subject, the provisions of that statute on that subject, have to prevail. There can be no application of, or invoking of any other general law, in regard to that subject:

Keeping the above stautory rule in mind, there can be no dispute that the provisions of the Insurance Act, 1938 alone will govern the rights under an insurance policy and not any general law. *Generalia specialibus non derogant*—Special excludes general.

Section 39 (1) and 39 (6), which are the substantive distributive clauses, enact that the holder of a policy.....may.... nominate the person or persons, to whom the money.........*shall be paid* in the event of his death and the nominee surviving the life assured, *shall be paid* the amount insured. The proviso to sub-section 1, enacts that he can appoint any person *to receive* the money, on behalf of a minor nominee. The name of the nominee gets engrafted in the policy itself, for which provision is made, in its tabular columns.

Nowhere does this Act, or any section thereunder provide any machinery for collection, by anyone, of the policy amount, on behalf of the heirs of the life assured, on his death. Nor is there any scope or reason, for such a provision in this Act, for reasons set out below. The specific words used are "*shall be paid*" and "*receive*", which mean and intend that the nominee has a full fight of disposal over the same. There is no definition clause like "nominee" in the Act at all, to acquire any special meaning or significance for that word. Section 39 (1) used the word 'nominate' in the first instance and only in the proviso and later sub-sections, the word "nominee" to describe the person so named. The dictionary meaning of the word 'nominate' is 'to name a person.' *Thus, the word nominee is not used in any technical sense, and it is not a term of art in the Act.* Thus there is no scope or warrant, for invoking the theory of a nominee under section 39, being or becoming a trustee or agent of the life assured's heirs or legal representatives. He is clothed with the right to receive the amount and left free to deal with it in any manner he likes. The nominee is not under any liability to account to anyone, for the money paid to him or received by him.

Further, a close look-up of sub-section 5, extracted above will demonstrate the correctness of the interpretation put forth above by me and expose the fallacy underlying the theory of

trusteeship and collective agent imputed to the nominee. This sub-section (5), provides that, in the event of the death of the nominee, before the policy matures for payment, the amount secured *under the policy, shall be payable to the policy-holder or his heirs or the legal representatives or the holder of Succession Certificate, as the case may be.* In this particular context, nominee is not contemplated and provided for, for payment. Does it not clearly proclaim that under section 39 (1) and 39 (6), nominee alone is exclusively contemplated in his individual capacity and not as trustee ?

Thus, the legislature was fully aware as to when and under what circumstances and contexts, the title and right to the policy amounts enure to the heirs or legal representatives of the life assured, and when it should not devolve on them, but only on the nominee for himself alone and has made provision for the same, and also accordingly provided specifically for different situations as well. Thus, the intention of the legislature is clearly reflected in the very section 39 itself as to in what context, the heirs or legal representatives or holder of Succession Certificate themselves have a right to the amount secured under the policy.

Nominee is given a rather special rank and position than the heirs and legal representatives of the life assured, in certain circumstances and background and there is no justification to go behind the clear provisions of the Act, in this regard, and spin a theory of trusteeship and collection agent for the nominee, on behalf of somebody else.

It is too farfetched and impossible of acceptance that when a life assured enters into a contract with the insurer, the Life Insurance Corporation of India, and exercises his choice of nomination under section 39, by naming a most endearing person of his, he does it with the sole idea of making that person, a trustee or collection agent with no personal or beneficial interest for him (nominee), but only with the onerous liability to account to the heirs, etc., for the said money, and hand it over to them. No such idea or motive is entertained and ever occurs in the mind of the policy-holder when he makes the nomination. In fact, he entertains the opposite *mens rea* of benefiting the nominee, individually and personally alone and not in trust for others.

It is too artificial and opposed to the realities to inject and induct in the mind of the policy-holder, notions of a trust and agency, when he makes a solemn nomination. *Many hundreds, nay many thousands of policy-holders (lives assured), would get disturbed, disillusioned and turne turtle, in their graves, if ever they should come to know, that their objects of affection by nomination, should get displaced by some one else, whom they did not want to benefit,* (they may be anyone, and in some cases even wife and children) should knock away the *money by some imaginative process (not even by any legal fiction) for which there is no sanction anywhere in the statute.*

If really the intention of the authors of the statute, had been that the insurance policy amount, on the death of the life assured, intestate should devolve on his heirs at law, nothing was easier for them, than to delete section 39, empowering the policy-holder to nominate a person, to receive the sum *and allow the law to take its own course, in its place or prescribe specifically, that the personal law of the life assured will govern the distribution of payment, of the insurance policy amount.* In the absence of any such provision, there is no escape from reading and interpreting section 39, as it stands and making over the amount to the nominee. There is neither law nor equity, nor good conscience, to deprive the nominee, of his legitimate

rights and unjustly enrich a person, whom the life assured, never intended to benefit.

It will be an inroad into the legislative power and content of the Parliament, for the Judiciary to attempt to find non-existent things in the statute. Section 39, as it stands, has to be treated as a special provision of law, equating the nomination, to the nearness of a will, or testament, declared solemnly by the life assured, as to the disposal of the policy amount. The absence of the terms, "Right", "Title", or "Interest", in section 39, in regard to the amount, directed to be paid, to the nominee, does not militate, in the least, against the nominee getting the policy amount absolutely to himself.

It is a well-known dictum, that it would be the primary duty of the Courts, to advance the avowed intention of Parliament and not to scuttle the same, by adhering to their own concepts, which do not fit in, in the context. To whittle down the nominee, to an accountable fiduciary agent, with no beneficial interest in the amount, under the policy, is not the object and intention of the law-makers nor that of the policy-holder.

Even assuming, without conceding, that there is lacunae in section 39, for which there is not the slightest warrant, as discussed by me above, the Courts would be justified in the background of the clear intention known, expressed and gathered from section 39, to resolve the same, in favour of the nominee's absolute title and right to the policy amount, instead of resorting to the doctrine of trusteeship and collection agent.

Maxwell and Craig in their book on 'Interpretation of Statutes', lay down, the following doctrine:—

"Where the main object and intention of a statute are clear, it must not be reduced to a nullity, by the draftman's unskilfulness or ignorance of law. Even sections and sentences omitted to be incorporated, can be supplied by the Court, if the intention of the legislative body is clear" *Ramasamy Pillai* v. *Muthusamy Pillai.*[1]

Coming now, to the case-law on the matter as far as I am aware, there is no Supreme Court ruling on this subject. The decisions of the High Court are not uniform in this regard.

The decision reported in *Atmaram Mohanlal* v. *Gunvantiben*[2] has fallen back on the theory of trusteeship and collection agent for the nominee. *Kesari Devi* v. *Dharma Devi*[3] does not favour the theory of, nominee being a trustee or collection agent. It gives sound and cogent reasons, not to follow the abovesaid theory and holds that the nominee has an absolute heritable right to the amount. *L.I.C.* v. *United Bank of India Ltd.*,[4] concedes, that if the nominee lives on the date of the death of the policy-holder, he can validly lay claim, to the payment of money for himself, personally and abolutely, though its observations, in certain other respects, lean in favour of the doctrine of agency, and trusteeship, for the nominee. *Raja Ram* v. *Mata Prasad*[5] was not a case between the nominee and the heirs of the deceased life assured. It related to the right of the creditor of the deceased life assured to proceed against the policy amount in the hands of the nominee. They leave open specifically the question, decided in *Kesari Devi's case*[3] regarding the nominee's title to the amount, stating that the same did not arise before them.

1. (1953) 1 M.L.J. S.N. p. 41.
2. (1977) 18 Guj. L.R. 668: (1977) A.C.J. 449: A.I.R. 1977 Guj. 134.
3. A.I.R. 1962 All. 355.
4. A.I.R. 1970 Cal. 513 at 518.
5. A.I.R. 1972 All. 167 (F.B.).

In *Karuppa Gounder* v. *Palaniammal*[6] the tie was between the wife (the 1st plaintiff) the nominee of the life assured, the daughter (2nd plaintiff) of the deceased life assured and mother-in-law (5th defendant) of the life assured. The learned Judges held that the 1st plaintiff being the nominee, she alone was entitled to the insurance amount. This ruling as one of a later Division Bench decision must prevail as against the earlier Division Bench ruling in *D.M. Mudaliar* v. *I.O. and B. Corporation*[7] *Smt. Saraswathi Bai* v. *Smt. Malati.*[8] and *Sarojini Amma* v. *Neelakanta Pillai*[9] have made the position of the nominee a truncated one, making him a trustee and an agent for collection, on the basis of certain English decisions and concepts, which can have no relevance, for us at all, for all the reasons I had set out above.

The matter is a simple one, based on the interpretation of a simple section 39. To attract the farfetched theory of trusteeship and agency, for nomination under section 39, is only doing violence to the clear language of the said section. It is regrettable, that all the above reasoning and arguments placed and advanced *supra*, in this discussion, had not been put forth before some of the Judges and there had not been a proper canvassing of the position in all its aspects.

The refusal on the part of the Gujarat High Court, in *Atmaram Mohanlal's case*[10] to send up that case to the Supreme Court, by issue of the Certificate sought for, on the ground that the case did not involve any substantial question of public importance, is unfortunate.

The characterisation of the decision reported in *Kesari Devi's case*[11] as an *ipsi dixit* of the Judges rendering it, by the Gujarat High Court, in *Atmaram Mohanlal's case*[12] referrred to above is not fair to the sound and robust wisdom displayed in that ruling.

A fresh look, a rethinking and analysis of the subject on the part of the Judiciary, is required, at an early date. To state, that a vital matter concerning millions of policy-holders of the monolithic giant organisation of Life Insurance Corporation of India, does not involve any substantial question of public importance, is not easily understandable and does little justice, to the all-embracing question, that arises and concerns a mighty substantial section of the Indian population.

An authoritative pronouncement, by the Supreme Court, on the subject dealt with, and pin pointed above, *viz., the rights of nominee under section 39 of the Act, which is a day-to-day question, engaging the top men of the Life Insurance Corporation authorities, settling innumerable contested claims, between the nominee* and the heirs of the life assured, is *eagerly awaited.*

If any difficulty or uneasiness should still be felt on the part of some of the Courts, to deviate from their trodden path, it is for Parliament to step in and make the law, *so as to reflect the wishes and intentions of the policy-holder and do justice to him.*

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6. (1963) 1 M.L.J 86: 76 L.W. 236: I.L.R (1963) Mad. 434: A.I R. 1963 Mad. 245.

7. (1956) 2 M.L.J. 476: I.L.R. (1957) Mad. 326: A.I.R. 1957 Mad. 115.

8. A.I.R. 1978 Karn. 8.

9. A.I.R. 1961 Ker. 126.

10. 1977 A.C.J. 449; A.I.R. 1977 Guj. 134.

11. A.I.R. 1962 All. 355.

12. 1977 A.C.J. 449: A.I.R. 1977 Guj. 134,

STARTING POINT OF LIMITATION FOR A SUIT TO REDEEM AN OTTI, WHERE THERE IS A PURAKADAM.

By

R. BALAKRISHNAN, *Advocate, Nagercoil.*

Purakadam is a further advance made by a mortgagee on the security of the land already mortgaged to him. The words "puravaippu or purakadam" imply that the amount due under the deed of further charge is payable with the original mortgage amount, in other words, the effect of the transaction is to increase the principal of the original mortgage by the amount subsequently advanced—*vide* Sundara Aiyar's Malabar and Aliya Santhana Law, 1922 Edition, page 456.

When there is a purakadam the cause of action for filing a suit for redemption is the date of the purakadam as per the Travancore Limitation Act 1100 M. E., (Act VI of 1100 M. E.) Section 20 (1) of the said Act reads thus:—

"If before the expiration of the period prescribed for redemption of a mortgage, the mortgagee accepts from the mortgagor a puravaippu or purakadam deed creating a further charge on the mortgaged property, and duly registered, the prescribed period of limitation shall be computed from the date of such puravaippu or purakadam deed." A provision similar to section 20 (1) of the Travancore Limitation Act, 1100 M.E., is not found in the Indian Limitation Act 1908. The Travancore Limitation Act 1100 M.E., was repealed, and the Indian Limitation Act was extended to the erstwhile Travancore-Cochin State with effect from 1st April, 1951, by virtue of section 6 of the Part B State Laws Act III of 1951.

What is the effect of the repeal on a purakadam executed before the Indian Limitation Act was extended to the erstwhile Travancore State? The area now comprised in Kanyakumari District and Shencotta Taluk of Tirunelveli district of Tamil Nadu was part of the erstwhile Travancore-Cochin State. This area is called transferred territory.

In *Thomas* v. *Victor*[1] Mr. Justice Mohan held that the mortgagor ought to consolidate both the mortgages and redeem both, and piecemeal redemption is impossible. He further held that his right of consolidation is not a mere right to have the advantage of an existing statute, but it is a vested right in the property. He accepted the view that the period of limitation has to be reckoned from the date of the purakadam. Justice Mohan laid emphasis on a provision in the purakadam deed also. It is submitted that the position would not be different even if there is no such provision in the purakadam deed. It is an implied term in a purakadam deed that the mortgagee shall be in possession of the mortgaged property in accordance with the purakadam deed also.

Mr. Justice Varadarajan in *Parameswaran Thampi* v. *Kanakamma Thankachi, and others*[2] has however held that a purakadam cannot be taken as a starting point for limitation for a suit for redemption after the Indian Limitation Act, 1908, was extended to the transferred territory. Mr. Justice Varadarajan has not considered the prior ruling by Justice Mohan. Mr. Justice Varadarajan came to the conclusion that after the Transfer of Property (Amendment) Act, 1929, the doctrine of consolidation cannot be applied at all, and that the Amendment Act did away with the doctrine of consolidation. It is submitted that the decision

1. (1976) 2 M.L.J. 5: 89 L.W. 164: A.I.R. 1976 Mad. 273.
2. (1977) 90 L.W. 258.

of Justice Varadarajan is debatable. In the transferred territory the Transfer of Property Act was not in force till 1st May, 1952. The general principles of the Transfer of Property Act, 1882, were however being applied in the transferred territory which formed part of erstwhile Travancore-Cochin State.

The doctrine of consolidation contained in section 61 of the Transfer of Property Act, 1882, as it stood before the Transfer of Property (Amendment) Act, 1929 was recognised as the law in the transferred territory prior to 1st May, 1952,—vide *P. Neelakantan* v. *Unnimini Pillai*[3] *Bhaskaran* v. *Agnisarmara*[4] *Azheekkal Sree Varatha Devaswom* v. *Ummen Sait Abdulla Sait.*[5] The Travancore and Travancore-Cochin Courts followed the dictum laid down in *Ramarayaningar* v. *Govinda Krishna*,[6] *Janki Nath* v. *Pramatha Nath*,[7] *Nachappa Goundan* v. *Samiappa Goundan.*[8] So, the law that is applicable in the transferred territory is the law as it stood prior to the Transfer of Property (Amendment) Act, 1929, for transactions which took place prior to 1st May, 1952. The right of consolidation is a vested right in the transferred territory, which cannot be taken away by the subsequent extension of the Transfer of Property Act to the transferred territory. When a purakadam deed was executed prior to 1951, in the transferred territory, the Travancore law is applicable, and not the Transfer of Property Act. In *M.S. Padmanabha Iyer* v. *Devadas Silus*[9] and another, Justice P.R. Gokulakrishnan held that for a transaction effected in the transferred territory prior to the Transfer of Property Act being made applicable to the transferred area, *i.e.*, 1st May, 1952, the Travancore law should be made applicable. In such circumstances if a purakadam was executed prior to 1st April, 1951; when the Indian Limitation Act was made applicable to the transferred territory, the law applicable is the Travancore law; the mortgagor could file a suit for redemption within the prescribed period from the date of the purakadam, which is to be taken as the starting point for limitation.

Apart from the above discussion, it is submitted that Mr. Justice Varadarajan's view is not correct for the following reasons:—In a suit for redemption by the mortgagor the date of purakadam is to be taken as the starting point of limitation. It is a vested right under section 20, of the Travancore Limitation Act. The extension of the Indian Limitation Act of 1908 to the transferred territory will not take away the already vested right of the mortgagor. It is held in *Subodhchandra* v. *Kanhai Lal*[10], as follows:—

"Even though the new Limitation Act of 1963, was retrospective in operation, it was not so far retrospective as to be confiscatory in nature even in respect of the existing rights of the parties. The decree which was alive by reason of the extension of the period effected by acknowledgment, and part payment under sections 19 and 20 of the old Limitation Act did not lose the extended life because of the fact that no such extension was available under the new Act of 1963". When section 20 of the Travancore Limitation Act

3. (1952) K.L.T. 129: 7 D.L.R. (T.C.) 479: A.I.R. 1952 T.C. 295.

4. (1946) T.L.R. 546.

5. (1950) K.L.T. 462: (1950) 5 D.L.R. (T.C.) 473: A.I.R. 1951 T.C. 17.

6. (1927) I.L.R. 50 Mad. 180: 52 M.L.J. 338: 25 L.W. 621: 54 I.A. 68: A.I.R. 1927 P.C. 32.

7. (1940) 1 M.L.J. 446: 51 L.W. 116: 67 I.A. 82: A.I.R. 1940 P.C. 38.

8. (1946) 2 M.L.J. 35: A.I.R. 1947 Mad. 18.

9. (1970) 2 M.L.J. 520.

10. A.I.R. 1968 Cal. 280.

specifically provides, that the prescribed period of limitation shall be computed from the date of purakadam for a redemption suit filed by the mortgagor, even though the Indian Limitation Act, 1908, has no such provision as in the Travancore Limitation Act of 1100 M.E. the already vested right of the mortgagor under section 20 of the Travancore Limitation Act cannot be taken away by the introduction of the Indian Limitation Act in the transferred territory, and by the repealing of the Travancore Act.

Further, clauses (*a*) and (*b*) of the proviso to section 6 of the Part B States Act (III of 1951) specifically save the existing rights derived by the parties under the Travancore Limitation Act, and the general principles of the Transfer of Property Act, Section 6 of the Part B States Laws Act, 1951, reads thus:—

"*Repeals and savings*:—If immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances, now extended to that State, that law shall, save as otherwise expressly provided in (this Act), stand repealed:

Provided that repeal shall not affect:—

(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder, or

(*b*) any right, privilege, obligation or liability acquired accrued or incurred under any law so repealed, or

(*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed, or

(*d*) any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

Provided further that, subject to the preceding proviso (any appointment, or deligation made notification, order, instruction or direction issued, rule, regulation, form, byelaw or scheme framed, certificate obtained, patent, permit or licence granted or registration affected) under any such law shall be deemed to have been done or taken under the corresponding provision of the Act or Ordinance as now extended to that State, and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act or Ordinance."

The proviso to section 6 is explicit that any rights accrued under the repealed Act are saved. Hence in filing a suit for redemption the mortgagor can avail of the benefit of Section 20 of the Travancore Limitation Act, and hence the prescribed period of limitation shall be computed from the date of purakadam and not from the date of the original mortgage.

Hence I submit that the conclusion arrived at by Mr. Justice Mohan is correct, and Mr. Justice Varadarajan's view requires reconsideration.

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SECTION 25 (*d*) OF THE TAMIL NADU COURT-FEES AND SUITS VALUATION ACT (XIV OF 1955).

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

If you want a declaration that you are not liable to pay Sales tax, Income-tax, Municipal tax or any other amount and the consequential relief of injunction, or a declaration of your rights as a trustee or any other position or a right of easement and the consequential relief of injunction, have recourse to section 25 (*d*) of the Tamil Nadu Court-fees Act and value the plaint on Rs. 400. This appears to be the *modus operandi.*

Section 25 (*d*) reads thus: "In other cases, whether the subject-matter of the suit is capable of valuation or not, fee shall be computed on the amount at which relief sought is valued in the plaint or on rupees four hundred whichever is higher".

Prior to the enactment of the Madras Court-fees and Suits Valuation Act (XIV of 1955) the valuation was according to section 7-IV (*c*) of the Court-fees Act (Central Act XVII of 1870).

Section 7-IV (c) *runs as follows*:

"7-IV (*c*)—for a declaratory decree and consequential relief—to obtain a declaratory decree or order where consequential relief is prayed,

..........in all such suits, the plaintiff shall state the amount at which he values the relief".

It will be very clear from a reading of section 25 (*d*) of the Tamil Nadu Act that it relates to intangible or incorporeal rights. That is how it has been judicially interpreted. Vide *Dr. Arthur Nathaniel* v. *R. P. Nathaniel*[1], *K. Sundaramurthy* v. *Manickammal*[2] and *Abdul Rahim Saheb* v. *The Madras State Wakf Board*[3].

So long as the relief relates to a right of easement or a right relating to an office or management there is no difficulty. The plaintiff has the right to put his own valuation or value it on the higher valuation of Rs. 400.

The difficulty comes in only when the plaintiff wants a declaration and injunction in respect of his non-liability to pay some tax or other monetary liability. In such cases can a plaintiff put his own valuation or value it on Rs. 400? In my humble opinion, he cannot.

In a very early case reported in *Rachappa Subrao* v. *Shidappa*[4], the Privy Council has laid down the dictum: "The object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue to the State and its provisions are to be so construed". This decision has stood the test of time and has been followed in later decisions.

In a suit when the plaintiff in effect wants to escape a monetary liability, the value of the relief will be the amount which the plaintiff wants to disown liability for. In whatever manner the plaint allegations are camouflaged the substantive relief is the escape from liability from payment of this particular amount.

"In order to determine the amount of Court-fee payable in a suit, the Court has to see in each particular case, what the nature of the relief claimed is and for that purpose it must look at the allegations contained in the plaint. The substance and not the mere language of the plaint must be looked into". Vide *Arunachalam Chetty* v. *Rangaswami Pillai*[5]; *Venkatasiva* v. *Venkatanarasimha*[6]; *Kayathan Roche* alias *G. C. Roche* v. *K. Chinnayya Roche*[7]; *Gutta Venkayya* v. *Venkata Ratamma*[8]; *K. Gopalan* v. *A. Venkatesan*[9]. If this test

1. (1962) 2 M.L.J. 420.
2. (1964) 1 M.L.J. 152.
3. (1965) 1 M.L.J. 278.

4. (1919) 36 M.L.J. 437 : 46 I.A. 24 : A.I.R. 1918 P.C. 188 (P.C.).
5. I.L.R. 38 Mad. 922 : (1915) 28 M.L.J. 118.
6. (1932) 63 M.L.J. 764 : A.I.R. 1932 Mad. 605.
7. (1939) 1 M.L.J. 425: A.I.R. 1939 Mad. 435.
8. (1937) 2 M.L.J. 916 : A.I.R. 1938 Mad. 253.
9. (1953) 1 M.L.J. 147 : A.I.R. 1953 Mad. 573.

is applied there can be no doubt that the plaint will have to be valued on the amount which he seeks to disown liability for.

In *Natharam Kashiram* v. *State of Madhya Pradesh*[10], the plaintiff disputed his liability to pay some amounts due to Government for which recovery proceedings had been instituted by the Government. The Court held that "the plaintiff is challenging his liability for a certain amount and if he were to do so it would mean that he is avoiding liability to that extent necessarily requiring an adjudication whether that amount is or is not due. Therefore this is not a case where the claim is incapable of any valuation or liable to be arbitrarily valued. The claim in such a suit being capable of definite valuation it cannot be urged that to the plaintiff it has a different value which he can put down in the plaint either for purposes of Court-fees or for purposes of jurisdiction. When he seeks to avoid the liability for a definite amount, value to him must be the same which he seeks to avoid".

Similarly in a recent Andhra decision (reported in *Andhra Pradesh State Electricity Board* v. *K. Ramachandra Reddy*[11]) in deciding a similar question arising under section 24 (*d*) of the Andhra Court-fees Act which is almost in *pari materia* with section 25 (*d*) of the Tamil Nadu Act, the Court held—"The test to be adopted by the Court in valuing the relief under secion 24 (*d*) is to find out the advantage which is sought to be gained by the plaintiff or the loss sought to be avoided. Essentially the question of Court-fee has to be considered only on the allegations made in the plaint".

It will be very clear from the decisions referred to above that the plaint allegations—the substance of the allegations have to be looked into for ascertaining the Court-fee. The Court-fee payable can only be on the amount for which the plaintiff seeks to avoid liability. That is the main criterion. The plaintiff has no right arbitrarily to put a notional value or value the relief at the higher value of Rs. 400.

This is what I consider to be the correct position as evolved by judicial decisions. If there is any difficulty or doubt regarding such a construction or interpretation, it is for the Legislature to make the position more clear by way of an amendment.

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10. A.I.R. 1962 M.P. 367.

11. (1977) 2 An.W.R. 366 : (1977) An.L.T. 101: (1977) 1 A.P.L.J. 154 : A.I.R. 1977 A.P. 200.

JUSTICE RAMAPRASADA RAO'S APPOINTMENT AS CHIEF JUSTICE.

It is highly gratifying that Justice Ramaprasada Rao has been appointed Chief Justice of our High Court with effect from 29th May, 1978. The members of the Bar had felt, in fact, that the appointment should have been made even earlier. With nearly twelve years of service as a puisne Judge—he was made an Additional Judge of the High Court on 7th December, 1966—and his earlier experience as a member of the Bar since 1939, Justice Ramaprasada Rao has all the qualities needed to make a successful Chief Justice. As a Judge he has won a good reputation showing in his work a happy combination of innate talent, temperament, erudition and a perennial interest in the intricacies of law. He has also evinced the other qualities indispensable to a Judge, great judicial patience and an innate sense of fairness and justice. He is quite conversant with the different branches of law and has been fairly at home whatever the point raised before him whether one of Contract or Hindu law or Constitutional law or Labour and Tenancy law or Procedural law. He has been responsible for a number of learned judgments which have been appreciated by the members of the Bar as thorough and stimulating thought. It would be useful to remember in this connection what Lord Bowen said apropos of English Judges long ago: "There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour would start the pulse of an English Judge upon the Bench or move by one hair-breadth the even equipoise of the scales of justice".

Justice Ramaprasada Rao is a pious and religious man, a lover of the fine arts and a champion of humanitarian causes. In his new task he carries the goodwill and co-operation of the members of the Bar. His tenure of office as Chief Justice will be relatively short extending up to 6th November, 1979. We convey our hearty felicitations to the new Chief Justice.

NOTE ON "S. PALANIVELU v. VERADAMMAL", (1978) 1 M.L.J. 212: A.I.R. 1977 Mad. 342.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

A somewhat disturbing decision has been handed down to us by Justice Varadarajan in the decision reported in *S. Palanivelu* v. *K. Veradammal*[1].

The facts of the case are as follows: The respondent filed a suit for declaration of title to the suit property and recovery of possession of the portion *D, E, F, G,* in the south-western corner and for a permanent injunction to restrain the appellant from interfering with her possession of the other portions of the suit property. She claimed title on the basis of a settlement deed of 11th June, 1962 executed by her mother in her favour. The trespass into the portion *D, E, F, G,* was said to be on 21st April, 1968. The appellant was the owner of the property to the west of the suit property, having been allotted to him by the Co-operative Housing Society. The appellant denied title and possession of the respondent. Both the lower and lower appellate Courts granted a decree as prayed for.

One fact which appears to have influenced the learned Judge was that the appellant had put up a portion of his main building and had sunk a well in the trespassed portion. Both the lower and lower appellate Courts have found that the appellant is a trespasser and has encroached upon the respondent's property and have granted a decree for declaration of title and for vacant possession after removal of superstructure.

Varadarajan, J., while concurring with the findings of the Courts below on the question of title and on the question of trespass, finds that the plaintiff will not be entitled to recovery of possession based on the doctrine of equitable estoppel amounting to acquiescence and that she will be entitled to only compensation as per section 51 of the Transfer of Property Act. He observed: "In the present case also, as already stated, the respondent has not done anything when the appellant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property. The appellant could not have done these things in a hurry. They must have taken several months for the appellant to complete the things which he had done on the property. The respondent had not disclosed these things in the plaint and has not prayed for mandatory injunction for the removal of superstructures put up by the appellant on the trespassed portion of the suit property. The Court would therefore be justified in inferring acquiescence on the part of the respondent. I consider that this is not a case for directing delivery of possession of the trespassed portion to the respondent. But this is a case where the respondent has to be compensated in money for the value of the trespassed portion".

I respectfully submit that this is a wrong approach and runs counter to several decisions of our High Court and other Courts and the Supreme Court.

On a question of fact also the learned Judge has not appreciated the notice and the reply that passed between the parties, when the respondent complained of encroachment in a small portion and the appellant denied it and asked the respondent to refer to the Housing Society. Another important factor which the learned Judge refused to consider was the absence of pleadings on the question of equitable estoppel. The decision reported in *Fakiruddin Saheb* v. *Ramaswamy Mudaliar*[2], wherein it has been held that no relief on the basis of equitable estoppel could be granted with-

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1. (1978) 1 M.L.J. 212: A.I.R. 1977 Mad. 342.

2. (1965) 1 M.L.J. 167.

out pleadings appears to have been brought to his Lordship's notice. But he says that inasmuch as the respondent has not referred to the constructions by the appellant on the trespassed portions in the plaint, it is not open to the respondent to contend that the question of equity should not be considered on the ground that no plea in that regard has been raised in the written statement.

Estoppel is a rule of evidence and has to be specifically pleaded and proved. So whether there are any allegations in the plaint about the constructions or not it is incumbent upon the defendant who wants relief on equitable considerations to specifically plead and prove the estoppel. The view of his Lordship overlooks this. The Supreme Court in *S. Madanappa* v. *Chandramma*[3], has held ...... "In some decisions of the High Court's reference has been made to 'equitable estoppel', but we doubt whether the Court while determining whether the conduct of a particular party amounts to an estoppel could travel beyond the provisions of section 115 of the Evidence Act". The learned Judge states that the respondent has not asked for the relief of mandatory injunction for the removal of the constructions. When there is a prayer for the relief of recovery of vacant possession the prayer for the relief of mandatory injunction seems to be redundant and superfluous.

The law on this question has been elaborately discussed by Justice M. M. Ismail in *Bodi Reddi* v. *Appu Goundar*[4]. With his characteristic thoroughness and lucidity, his Lordship has exhaustively discussed the question on various aspects with reference to various decisions and finally observes: "thus both on principle and on authority it is clear, that when the owner of a land files a suit for recovery of possession of this land from a trespasser, who had built upon the land with incidental prayer for a mandatory injunction directing the defendant to demolish the building put up by him the plaintiff (owner) is entitled to succeed once he has established his title and the fact that he has been in possession of the property within 12 years from the date of suit...... In this view *viz*., that when the suit itself is for recovery of possession, the question of acquiescence, or delay or laches on the part of the plaintiff cannot arise...... In a very early case, *Rama Rao* v. *Raja Rao*[5], referred to in *Premjet Jivan Bhate* v. *Haji Cassum Juma Ahmed*[6], this Court held that the equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. Therefore once the suit is within time the doctrine of laches or acquiescence has no place to defeat the right of the plaintiff to obtain relief in the suit". In *N. C. Subbayya* v. *Pattan Abdulla Khan*[7]. Justice Viswanatha Shastri says: "To say the buildings erected in such circumstances should not be directed to be removed and only damages could be awarded would, in my opinion, be in effect to sanction a condemnation of the plaintiff's property and an appropriation of it for the defendant's use....., To say that a small strip of building site could thus be appropriated by a trespasser would be to admit a rule of law which can be applied limitlessly". It is needless to refer to various other decisions as the decision of Justice Ismail is a comprehensive one.

Section 51 of the Transfer of Property Act cannot be applied to the case of a 'trespasser' as has been repeatedly stated by our High Court and in this case this appellant has been found to be a trespasser by all the three Courts.

It is neither just nor fair to say that a man will lose his right to recover possession of property before the time limited therefor by the Limitation Act simply on the basis of a rule of evidence which is not even pleaded.

For the foregoing reasons I respectfully submit that this decision requires reconsideration.

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3. (1966) 2 S.C.J. 310: (1965) 8 S.C.R. 283: A.I.R. 1965 S.C. 1812.
4. (1970) 2 M.L.J. 577.
5. (1864) 2 Mad. H.C.R. 114.
6. (1996) I.L.R. 20 Bom. 28.
7. (1956) 69 L.W. (Andh.) 52.

A NOTE ON V. K. KARUPPIAH AND OTHERS v. THIRUVANNAMALAI ADHEENAM, I. L. R. (1978) 1 Mad. 343: 90 L.W. 662.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

The respondent Adheenam was granted ryotwari patta in respect of the suit lands on the basis of his claim for both melwaram and kudiwaram rights over the suit properties which were inam properties taken over by the Government on the abolition of Inam Estates. The question of title to the suit properties was left open to be decided by the civil Court. The Adheenam then filed a suit for declaration of title and injunction or in the alternative for possession alleging that the appellants were lessees for a couple of years, and they were not in possession and they cannot claim cultivating tenancy rights as they had denied the title of the landlord. The suit was dismissed by the trial Court and the decision was confirmed by the lower appellate Court. The High Court remanded the matter to the lower appellate Court. After remand the lower appellate Court found that the respondent had title and that the appellants cannot claim tenancy rights as they had denied the title of the landlord and decreed the suit. Against the decision the appellants preferred this appeal to the High Court. V. Ramaswami, J., held that the respondent had title, but disallowed the claim for possession on the ground that the civil Court had no jurisdiction to grant the relief of possession as the appellants were cultivating tenants entitled to the benefits of the Madras Cultivating Tenants Protection Act. It was observed: "In fact the question whether there is wilful denial or not will have to be gone into by the Revenue Court and this Court is not entitled to go into that question........ I am therefore of the opinion that the only question that could be gone into by a civil Court in a suit between the landlord and tenant is whether there is a tenancy agreement express or implied between the landlord and the tenant and whether the defendant is a cultivating tenant within the meaning of the Cultivating Tenants Protection Act.......Once the civil Court finds that the defendant is a cultivating tenant within the meaning of the Cultivating Tenants Protection Act it could not order eviction of the tenant and either the suit will have to be dismissed on the ground of want of jurisdiction so far as the claim for possession is concerned or the plaint will have to be returned for representation in proper Court".

This decision runs counter to the decision of the Supreme Court in *Chinnamuthu Gounder* v. *Perumal Chettiar*[1]. Even on facts the learned Judge has not noticed some important factors: (1) The appellants denied not only the title but also the tenancy itself. (2) For faslis 1369 and 1370 the lands were leased in public auction to plaintiffs 2 to 4 who had taken possession and whatever tenancy rights the appellants can claim had become extinguished and barred inasmuch as they had not asked for restoration of possession under section 4 of the Act within the period limited therefor, vide *P. Subbiah Mudaliar and others* v. *Pakkiri Pandaram*[2]. Once the period prescribed under the Act expires the landlord gets a vested right against any claim of the tenant for restoration to possession. So even on facts it will be found that the appellants did not and could not claim any tenancy rights.

In *Chinnamuthu Gounder* v. *Perumal Chettiar*[1], the Supreme Court held: "The clear import of section 6-A is that in any suit for possession if the defendant proves not only that he is a cultivating tenant but also that he is entitled to the benefits of the Act, the civil Court is bound to transfer it to the Revenue Divisional Officer and cannot

1. (1970) 2 M.L.J.(S.C.) 114: (1970) 2 S.C J. 626 : (1970) 2 An.W.R.(S.C.) 114 : (1970) 3 S.C.R. 704: A.I.R. 1970 S.C. 1197.
2. (1958) L.W. 698: (1958) 2 M.L.J. 510.

proceed to try and dispose it of itself. In the present case it has been found by the High Court as also by the trial Court that the appellants had wilfully denied the title of the respondent who is the landlord. *They thus became disentitled to the benefits under the Act. Consequently the civil Court had jurisdiction to proceed with the trial and there was no question of the transferring the suit to the Revenue Divisional Officer.* There has been a consistent course of decisions of the Madras High Court that in order to attract the applicability of section 6-A both the conditions must co-exist, *viz.*, the defendant must be a cultivating tenant within the meaning of the Act and he should be entitled to the benefits of the Act........The appellants have been clearly found to have wilfully denied the title of the landlord. That disentitled them to the benefits of the Act by virtue of the provision contained in section 3 (2) (*d*). *The trial of the suit was thus competent in the civil Court which had complete jurisdiction to dispose of the same*". Through this decision was cited the learned Judge has not distinguished the same.

In *V. Kuppusamy and others* v. *Sri Subramaniaswamy Devasthanam*[3], referred to by the Supreme Court in *Chinnamuthu Gounder* v. *Perumal Chettiar*[4], Justice Balakrishna Iyer has held that: "Having regard to the scheme of the Act and the language of the section, before a civil Court can transfer a proceeding under section 6-A of the Act it must be satisfied that the tenant is not only a cultivating tenant as defined by the Act, he should also be entitled to some benefit or other under the Act."

In *Aravan Servai* v. *Kanugan Servai*[5], P. N. Ramaswami, J., has held that: "The jurisdiction of the Revenue Divisional Officer is dependent upon two factors, *viz.*, that the relationship of landlord and cultivating tenant must exist between the parties coming before him and it must be for one of those reliefs specified in the Act". In *Ammasi Gounder* v. *Ravala Gounder*[6], Justice M. M. Ismail decides: "The protection against eviction which a tenant has under the provisions of the Madras Cultivating Tenants' Protection Act is only against the landlord and not against any other person. Therefore if the defendant in a suit for ejectment pleads that the plaintiff in the suit is not his landlord there is no scope for the defendant contending that he is entitled to any protection under the provisions of the Act. *The very basis of the protection conferred by the Act is the existence and the acknowledgment of the relationship of landlord and tenant between the parties.* Before a civil Court can transfer the matter to the Revenue Divisional Officer under section 6-A of the Madras Cultivating Tenants' Protection Act three conditions must be fulfilled. First, the defendant must be a cultivating tenant; secondly, he must be entitled to the benefits of the Act; and thirdly, he must on transfer of the proceedings from the civil Court to the Revenue Divisional Officer be in a position to obtain one or the other of the statutory reliefs provided in his favour under the Act. The jurisdiction of the civil Court to transfer a suit to the Revenue Divisional Officer is dependent on its finding on these three conditions and *if any one of these conditions is not fulfilled the civil Court does not lose its jurisdiction* and it cannot transfer the suit to the Revenue Divisional Officer". Nothing can be more explicit and clear than this lucid exposition of law. As Justice Ismail points out, for the defendant to claim benefits under the Act and for the Court to find that he is entitled to the benefits of the Act, there must be an admitted pre-existing relationship of landlord and tenant. In the case in question the appellants not only deny the title of the landlord but also the tenancy

3. (1958) L.W 303: (1958) 1 M.L.J. 208.
4. (1970) 2 S.C.J. 616 : (1970) 2 M.L.J. (S.C.) 114.
5. (1958) L.W. 532 : (1958) 2 M.L.J. 505.
6. (1968) 2 M.L.J. 90.

itself. So they cannot claim and they do not in fact claim any benefits under the Act and the civil Court's jurisdiction is not ousted.

For the foregoing reasons it is respectfully submitted that the decision requires reconsideration.

MARCH OF LAW, 1977

Introduction

Certainty of the law, consistency of rulings and comity of Courts, all flowing from the same principle converge to the conclusion that a decision once rendered must later bind like cases except in exceptional circumstances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning, in which cases it may not have the sway of binding precedents[1]. At the same time it has been recognised that judicial consistency is not the highest state of legal bliss and law must grow; it cannot afford to be static and, therefore Judges ought to employ an intelligent technique in the use of precedents; "precedents should be stepping stones and not halting places."[2] The Blackstonian fiction that Judges do not make law is not now accepted. Lord Denning, M.R. observes: "Many of the Judges in England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is being discarded everywhere. Every new decision—on every new situation—is a development of the law. Law does not stand still. It moves continuously"[3] In such development, decisions arrived at after full argument by counsel carry great weight. There is much force in the observation of Hankford J., made long long ago, in 1409, that "argued law is tough law". Nearly five centuries and a half later, Megarry, J., has endorsed it remarking: "today as of old by good disputing shall the law be well-known".[1] A decision reached after the testing and refining process of argument naturally carries great weight and authority as an exposition of the concerned law in relation to the fact situation. During 1977 about 18 judgments of the Supreme Court have been reported in the columns of this Journal besides almost all the imporant decisions of our High Court. An endeavour is made hereunder to refer briefly to the course of the march of law in some of the well-known and fairly significant titles of law.

1. *Mahabaleshwar Prasad* v. *Kanhaiyalal*, (1975) 2 S.C.J. 376 : A.I.R. 1975 S.C. 907.

2. *The Punjab University, Chandigarh* v. *V'ay Singh Lamba*, A.I.R. 1976 S.C. 1441.

3. *See* Foreward to The Supreme Court of India by Rajeev Dhavan, p. vii.

Courts: their jurisdiction, powers and duties:

In *Kodiketti Nadar* v. *M. L.M. Fernando*[2], it is pointed out that pragmatically a Letters Patent appeal is a second appeal, but in the absence of any inhibitions as provided under section 100, Civil Procedure Code the Jurisdiction exercisable by the Court under Clause 15 of the Letters Patent appears to be vast and might include sometimes the reappraisal of facts and merits; that on that score, under the guise of reappraisal the Court exercising jurisdiction under the Letters Patent would not be justified in interfering with the concurrent findings of fact rendered by the single Judge who, after considering the evidence and the records came to certain conclusions in which he agreed with the trial Court and that in such a case it would be difficult for the Court exercising jurisdiction under the Letters Patent to brush aside such concurrent findings of fact and once again for a third time consider the evi-

1. *Cordell* v. *Second Clanfield Propertica Ltd* (1968) 3 W.L.R. 864.

2. (1977) 1 M.L.J. 141.

dence and the record to find otherwise. *Jayam & Co.* v. *Gopi Chemical Industries, India*[1], makes it clear that under the Civil Procedure Code the local limits of the ordinary original jurisdiction of the High Court is a 'district' and the fact that the original side of the High Court comes within the definition of 'district' in the Trade and Merchandise Marks Act does not mean that the original side rules and the Letters Patent are not applicable to a suit instituted in the High Court for infringement of a registered trade mark. *Subramania Mudaliar* v. *Ideal Finance Corporation*[2], states that in recent years superior Courts, in our land have been applying the fundamental principles of natural justice to a wide variety of proceedings in cases classified by academic writers under the head 'administrative law' and that recent trends in Court-decisions show that the principle of natural justice, of notice to the party affected, must be applied even to purely administrative decision-making, if that should affect an individual's right. *Miss Sathya Rao* v. *University of Madras*[3], holds that it is a principle of interpretation of statutes that a statutory provision shall not be so interpreted as to fail to reach a very large proportion of things, matters or persons sought to be covered by the statutes and that it is equally well-settled that if the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation the Court should avoid a construction which would lead the legislation to futility or render the same ineffective and should rather accept the construction based on the other view that the Legislature would legislate only for the purpose of bringing about an effective result. *Thiruvallurammal* v. *Kullachiammal*[4], expresses the view that section 41 of the Lunacy Act can be invoked either before or after the order of inquisition is made, the power can be exercised by the Court before the order of inquisition to have an interview with the alleged lunatic to ascertain his mental condition, after the order of inquisition the section can be invoked for the conduct of the inquisition proceedings, and an order requiring the alleged lunatic to attend Court for the purpose of being personally examined by the Court can be made under section 41 even before making an order for inquisition.

1. (1977) 1 M.L.J. 286.
2. (1977) 2 M.L.J. 385.
3. (1977) 2 M.L.J. 403.
4. (1977) 1 M.L.J. 306.

Constitutional law:

In *Perumal Chetty & Bros.* v. *State of Tamil Nadu*[1], it is held that a Government order under section 29 of the Tamil Nadu Buildings (Lease and Rent Control) Act granting exemption from the Act only to Hindu, Muslim and Christian charitable institutions is not invalid on the ground of its being discriminatory against Parsi religious institutions, that in considering the validity of the order the Court has to take the state of affairs in the State of Tamil Nadu for which the Act is intended to apply and that the plea of a Hindu tenant under a Hindu religious institution that because Parsi religious institutions are not exempted the law is discriminatoy cannot be accepted and in the instant case the tenant was not directly affected. *Dharmarajan* v *Union of India*[2], lays down that whatever be the basis or the nature of the challenge and whatever be the cause of action pleaded in the writ petitions and whatever be the error complained of in the order passed by the executive, there can be no gainsaying that, in the instant case, they led to one grievance only, namely that the petitioner's rights are affected, and those rights, whatever might be the limited ground on which they are sought to be enforced, must be traced ultimately, to the rights conferred by Part III of the Constitution; and the moment the enforcement of those rights in a Court of law are suspended no one would have *locus standi* to move the Courts for enforcement of his rights whatever be the particular ground on which those rights might happen to be asserted. *Karunanidhi* v. *Union of India*[3], decides

1. (1977) 1 M.L.J. 19.
2. (1977) 2 M.L.J. 22.
3. (1977) 1 M.L.J. 182.

that the words 'federation', 'autonomy' and 'federating States' have varying meanings and what a particular word means depends on the context; it will be totally misleading to apply the meaning given to the words in the context of the American Constitution to our Constitution; if the word federation can be used at all, India is a federation of various States designated in the Constitution for the purpose of efficient administration and governance of the country: that State as such has no inherent power or autonomous power which cannot be encroached upon by the Centre; the powers of the Centre and the States will have to be looked for in the Lists and Articles of the Constitution; that the theory of federation and the States having some powers apart from the Constitution has no basis, the States have no existence apart from the Constitution; that it has been held consistently by Courts that requirements under Article 77 (1) and (2) are merely directory and the Government, if necessary, can lead evidence to prove that the proceedings were taken according to the requirements of the Constitution and the rules. *Chidambaram Chettiar* v. *Government of Tamil Nadu*[1], holds that there can be no doubt that the questions relating to the validity of the Tamil Nadu Debt Relief Act are very important and involve the interpretation of the provisions of the Constitution, that the questions do not admit of two opinions as there can be no doubt about the competence of the State Legislature to enact the impugned legislation, that as the question is not fairly open to argument, it will not be a substantial question of law and hence the petitioner is not entitled to a certificate either under Article 132 or 133 of the Constitution. *K. Mathew* v. *T. N. K. Estates*[2], makes it clear that the norms for grant of leave to appeal to the Supreme Court are that the case should involve a substantial question of law of general importance and that in the opinion of the High Court the question needs to be decided by the Supreme Court; that whether a particular case poses a substantial question of law is essentially a matter which depends upon the merits of each case; that what is substantially a question of law would, of course, depend upon the facts and circumstances which arise in a particular situation and it would be hazardous to iron-jacket an elastic expression such as a substantial question of law within certain set norms and principles; and that the question whether a suit could be filed for possession simpliciter without regard to the letter and spirit of the latter part of section 115 of the Transfer of Property Act is a substantial question of law of general importance. *Associated Transports* v. *Union of India*[1], points out that suspension of Article 166 (3) does not mean that all the rules framed under that Article have been abrogated, that during a period of Proclamation of emergency the Governor being a person equated to the President can himself act and no question of delegation arises, that the Secretary functions by virtue of the powers validly given to him by the Governor, and that the appointment of the Advisers and the allocation of the work between them was in exercise of the powers which have been vested in the Governor by the Notification of the Proclamation of President's rule. *Dharmarajan* v. *Union of India*[2], states that where the right to raise an objection based on statutory provisions is within the ambit of the order of suspension of fundamental rights passed by the President of India under Article 359 (1) of the Constitution no writ can lie. *Mohd. Aboobacker* v. *Tamil Nadu Wakf Board*[3] lays down that the Constitution has made it clear that where an alternative remedy provided in the concerned statute was not availed of no writ petition under Article 226 should be entertained and where an order passed under the Wakf Act was challenged by the mutawalli on the ground of non-mention specifically of the relevant sections no relief can be granted since a misquotation of the section or the omission to quote a pro-

1. (1977) 1 M.L.J. 443.
2. (1977) 2 M.L.J. 121.

1. (1977) 2 M.L.J. 107.
2. (1977) 2 M.L.J. 22.
3. (1977) 2 M.L.J. 164.

vision of law would not make the notice or order unenforceable and much less illegal. *Muthu Velu Udayar* v. *State of Tamil Nadu*[1], decides that where the petitioner did not avail himself of the remedies vouchsafed to him under rule 6 of the Tamil Nadu Panchayats Rules and rushed to the Court he should not be granted any relief whatsoever in exercise of the Court's extraordinary jurisdiction under Article 226. *Doraisami* v. *Bank of India*[2], expresses the view that only if an employee had a statutory status she would be entitled to the relief of declaration of being in employment, if the termination of her services was in contravention of statutory provisions and hence where the petitioner had no such status she would not be entitled to any relief under Article 226 and her remedy, if any, was to approach the civil Court. *Madras Steelware Industry* v. *Joint Chief Controller*[3], makes it clear that where the petitioner could not ask an authority to do a thing which that authority admitted that it would be beyond his power to do and that what he did earlier which provoked the petitioner to seek for enforcement of that order was based on a mistaken appreciation of facts, there was no justiciable or enforceable right vested in the petitioner and he could not ask for a writ of *mandamus*.—*Thangathammal* v. *Secretary, Food Department*[4] points out that in the context of the proceedings of the Rice Milling Industry Regulation Act, no individual has a right, strictly so-called, to obtain for himself a permit or licence, any more than he has to prevent its being granted to another; that the grant of a licence under the Act is essentially an act of administrative discretion, although in taking a decision the concerned authority might perforce have to take note of relevant factual considerations bearing on public interest and might choose to hear representations from private interests also; and, by merely putting forward the considerations germane to a proceeding under section 5 (4) of the Act an existing rice mill owner cannot acquire *locus standi* to challenge the validity of a grant to another person. *W. S. Insulators of India Ltd.* v. *Presiding Officer*[1], states that the writ Court exercising jurisdiction under Article 226 is not completely bereft of authority to enquire and find out the realities in a particular case; it may be that in the course of such enquiry some factual investigation may be called for; there is no total ban or bar on the Court to undertake such an investigation in the interests of justice; *a fortiori* it may be necessary to do so in a case where it is reasonably felt that the adjudication of a dispute between the workmen and the management would unnecessarily be protracted and the length of delay, which is avoidable could be sliced to a great extent if an enquiry into the merits and facts is undertaken even when exercising the visitorial jurisdiction under Article 226.

1. (1977) 2 M.L.J. 117.
2. (1977) 2 M.L.J. 60.
3. (1977) 2 M.L.J. 212.
4. (1977) 2 M.L.J. 221.

In *State of Madhya Pradesh* v. *Ratan Singh*[2], the Supreme Court holds that under section 401 of the Code of Criminal Procedure, 1898, the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner. In *S. Narayana Iyer* v. *Union of India*[3], the Supreme Court lays down that Courts have no jurisdiction under Article 226 to go into the reasonableness of telephone rates and charges, for the reasons (*i*) when any subscriber to a telephone enters into a contract with the State he has the option to enter into a contract or not, (*ii*) the telephone tariff is subordinate legislation and legislative process and the rules framed regarding the rates are laid before each House of Parliament and they take effect when they are passed by Parliament, and (*iii*) the question of rates is first gone into by the Tariff Inquiry Committee which is headed by non-officials and the tariff rates are then placed before the House

1. (1977) 2 M.L.J. 424.
2. (1977) 1 M.L.J. (S.C.) 19.
3. (1977) 1 M.L.J. (S.C.) 41.

in all the budget proposals and the rates therefore become a legislative policy as well as a legislative process and is not for judicial determination. *Palanichami* v. *Canara Bank*[1], states that it is not correct that exercise of a contractual right of termination of services by an employer could be scrutinised and interfered with by the Court under Article 226 and that where an order of termination of service is made in exercise of the power conferred on the employer under the terms of a contract the order cannot be set aside by the Court. *Collector of Customs* v. *Mehta Paint Works*[2], decides that Rules 13 (*a*) and (*b*) of Chapter IV of the Scale of Rates Chargeable by the Port Trust are in the nature of a contract between the parties and cannot be enforced by the issue of a writ of *mandamus*. *Ramachandran* v. *Tudaiyalur Co-operative Agricultural Services Ltd.*[3] expresses the view that whether a person was by reason of conviction for an offence of sale of adulterated milk by an employee of a Milk Supply Society of which he was the President suffered disqualification for membership of a Co-operative Society has to be decided only after notice to the person and affording him an opportunity to put forward his case, and an order terminating his membership without giving him such opportunity cannot be allowed to stand and can be set aside under Article 226. *Somasundara Pandarasannadhi* v. *State of Tamil Nadu*[4], makes it clear that for a consideration of the objections preferred against a notification published as per Government's direction to the Commissioner of Hindu Religious and Charitable Endowments to arrange for such publication declaring its intention to extend the provisions of the Hindu Religious and Charitable Endowments Act to a particular endowment on the ground of mismanagement to be legally effective, it should be done after hearing the objector and affording him an opportunity of proving the truth of his objections; and where neither the Commissioner nor the Government had called upon the petitioner to substantiate his objections by any oral representation or the production of evidence it could not be said that the objections of the petitioner were considered at all and the impugned order was liable to be quashed. *Bhama Ramamoorthy* v. *State of Tamil Nadu*[1] points out that where lands are sought to be acquired exercising the power of eminent domain the minimum that could be expected of the Government is to follow the procedure strictly and that where the notification issued under section 4 (1) of the Land Acquisition Act as published in the Gazette had not shown the name of the petitioner as it ought to have in view of a change of the revenue registry, the notification was liable to be quashed. *Ramaswamy* v. *Assistant Engineer*[2], holds that in view of the provision in section 7, Tamil Nadu Land Encroachment Act that before taking proceedings under section 6 of the Act the person sought to be evicted should be served with a notice under section 7, the initiation of notice for summary eviction in the absence of notice under section 7 served on the petitioner is not a proper compliance with the provisions of the statute and the impugned memorandum is therefore liable to be quashed. *Correya* v. *Deputy Managing Director (Tech.), Indian Airlines*[3], states that the officers and employees of the Indian Airlines Corporation have a statutory status and for violation of any of the statutory regulations relief can be sought and where the entire disciplinary proceedings against the petitioner were vitiated for violation of the basic principles of natural justice for instance, by reason of statements taken behind the back of the petitioner at the time of the preliminary enquiry being taken as substantive evidence, they are liable to be set aside. *K. R. Raman* v. *Special Deputy*

1. (1977) 2 M.L.J. 474.
2. (1977) 1 M.L.J. 15.
3. (1977) 2 M.L.J. 472.
4. (1977) 2 M.L.J. 301.

1. (1977) 1 M.L.J. 323.
2. (1977) 1 M.L.J. 162. Cf. *Krishnappa Mudaliar* v. *Government of Tamil Nadu*, (1977) 1 M.L.J. 406 holding that section 4 (1) notification is purely preliminary in nature and is administrative in character and no writ will lie to quash such a notification
3. (1977) 1 M.L.J. 364.

Tahsildar[1] decides that in view of the fact that three different dates were given for the so-called enquiry, even if such enquiry had been held, which was highly improbable, it should have been perfunctory without the petitioner having a real opportunity to prove his rights as a tenant and in those circumstances, in the interests of justice, the impugned order is liable to be quashed. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[2] points out that in regard to the question whether an order, which is made final by reason of the in-built provisions in a statute is still revisable under the supervisory or visitorial jurisdiction of the Superior Court either under section 115 of the Civil Procedure Code or under Article 227 of the Constitution of India, in so far as the jurisdiction under the Constitution is concerned, it has to prevail because no statute enacted under the law can make an inroad into the provisions of the Constitution and, in so far as the revisional jurisdiction under section 115 of the Civil Procedure Code is concerned, there are certain guidelines in the section itself which permit the exercise of such jurisdiction. *Chidambaram Chettiar Firm* v. *State of Tamil Nadu*[3] holds that the provisions of Article 301 are subject to the powers under Article 304, that Article 304 will prevail over the general right of trade and commerce guaranteed under Article 301, that Article 304 also specifies that the Legislature of a State may impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest, that whether the restrictions are reasonable or not is justiciable by Courts, and that the provisions of the Tamil Nadu Debt Relief Act, 1976 are valid and not unconstitutional. *Venkataraman* v. *State of Tamil Nadu*[4], holds that when once a police officer is absolved of all charges the reason which prompted the Government not to consider him for promotion is obliterated, so that the right to have his case reopened and his name considered for promotion with effect from the date when a person junior to him was promoted will revive; further he will be entitled to such consideration with the application of the same criteria which were brought to bear on the promotion of his juniors; if there was more than one such occasion the case will have to be reconsidered in relation to them all and on the same basis; refusal of these rights to him is a denial of equality of opportunity in the matter of employment and is hit by Article 16 and that this right cannot be denied to him even though he might since have retired having attained the age of superannuation. In *Dalavai* v. *State of Tamil Nadu*[1], the Supreme Court decides that the pension scheme formulated by the Tamil Nadu Government granting pension to anti-Hindi agitators contains the vice of disintegration and fomenting fissiparous tendencies; that if any State will be engaged in exciting emotion against Hindi or any other language such provocation has to be nipped in the bud because these are anti-national and anti-democratic tendencies; that there is no legislative sanction for the scheme and the Government could not by an executive order authorise payment of the pension scheme; that the pension scheme is unconstitutional and the budget sanction is equally unconstitutional; and the State will be competent to claim refund of the moneys illegally and unconstitutionally paid. *Chidambaram Chettiar* v. *State of Tamil Nadu*[2], expresses the view that the words in Entry 30 in List II of Schedule VII, to the Constitution have to be read disjunctively; that the legislative competency would relate therefore to (*i*) money-lending and money-lenders, and (*ii*) the relief of agricultural indebtedness; that the entry would cover not only the scaling down of debts due to money-lenders but also the liquidation of debts; and that the provisions of the Tamil Nadu Debt Relief Act may fall under Entry 30 of List II, money-lending and money-lenders, relief of agricultural indebtedness, and Entry 26, "trade and commerce."

1. (1977) 2 M.L.J. 234.
2. (1977) 2 M.L.J. 98.
3. (1977) 2 M.L.J. 1.
4. (1977) 1 M.L.J. 317.

1. (1977) 1 M.L.J. (S.C.) 40.
2. (1977) 2 M.L.J. 1.

Industrial and labour law :

In *Workmen of M. F. Club* v. *Presiding Officer*[1], it is pointed out that the activities of the Madras Flying Club Limited were carried on in a systematic fashion and with a commercial motive, that there was also no nexus between the main object, namely, study of aeronautics and the club's activities, and the Club was, therefore, an 'industry' within the meaning of section 2 (*j*) of the Industrial Disputes Act, 1947. *Management of Safire Theatre* v. *Additional Commissioner for Workmen's Compensation*[2] decides that section 2-A of the Industrial Disputes Act does not fully bar the remedy under section 41 of the Madras Shops and Establishments Act, 1947; that if a decision is rendered under section 41 (2) of the Madras Act before the Government had made a reference under section 10 of the Industrial Disputes Act, the decision would be final between the parties, but if before the conclusion of the enquiry under section 41 of the Madras Act, the Government makes a reference under section 10 of the Industrial Disputes Act the pending proceedings under the Madras Act cannot be continued, but if a reference has been made before the conclusion of the appeal under section 41 of the Madras Act the proceedings under the Industrial Disputes Act will have to be followed; that after a reference had been made under the Industrial Disputes Act, the provisions of section 41 of the Madras Shops and Establishments Act would not be applicable; the dispensing with the services of the workmen could not be challenged under section 41 of the Madras Act; and that section 41 of the Madras Act is not repugnant to the provisions contained in section 2-A of the Industrial Disputes Act and is not rendered ineffective by the provisions of Article 254 of the Constitution. *Industrial Chemicals Ltd.* v. *Labour Court*[3], holds that it is open to the Labour Court in exercising jurisdiction to take note of the several cicumstances in the particular case before it and decide not to grant the relief of reinstatement, but grant instead relief by way of compensation to the workman; it is this principle on which section 11-A of the Industrial Disputes Act is based; there is nothing in section 25-F to show that the term 'paid' was to be understood in any special or limited sense, so whatever meaning the expression has under the common law or general law must also be intended to be connoted when the term is employed in the section and if under the general law a cheque was regarded as tantamount to payment of money upon no principle can a similar position be denied for payment by cheque under section 25-F; that the true position in law is that when a cheque is accepted by the creditor the date of accepting the cheque is regarded as the date of payment; that the settled conception of modern jurisprudence is to regard a cheque not as a conditional payment, but as a payment equivalent to cash, effective from the date of tender in all cases where the cheque is subsequently encashed and appropriated by the payee; that under section 25-G an employer may retrench any workman from service; if the workman was the last to be employed in his establishment, the employer can retrench him without assigning any reasons whatsoever in the notice of retrenchment; if, on the contrary the workman was not the last to be employed the employer must state reasons for retrenching him from service and record them in the notice of retrenchment; and that whichever way the issue as to retrenchment may be tossed about in discussion in individual cases, it must, in every case come down on all-fours to section 25-G. *Duraikannu* v. *General Manager, Parry's Confectionery Ltd.*[1] states that a domestic tribunal is not a Court and the rules of evidence are not applicable to proceedings before it; that the scope of the tribunal's enquiry in a petition for approval under the proviso to section 33 (2) is very limited; that where on an identical charge and evidence in a criminal prosecution against an employee he has been found not guilty on merits and therefore acquitted no departmental enquiry can be under-

1. (1977) 1 M.L.J. 99.
2. (1977) 2 M.L.J. 191.
3. (1977) 1 M.L.J. 389.

1. (1977) 1 M.L.J. 521.

taken on the identical charge and a finding of guilty given on like or identical evidence ignoring the finding of a competent criminal Court of acquittal on merits; but if an acquittal in a criminal prosecution is on a technical ground or by giving the benefit of doubt, the position would be different and in such a case the departmental enquiry on a similar charge and evidence would be open and no want of *bona fides* could be attributed to the enquiry.

Contracts and ancillary laws:

In *Saraswathi Ammal* v. *Lakshmi Ammal*[1], it is held that mere proof of relationship, however near it may be, may not be sufficient for a Court to assume that one relation was in a position to dominate the will of another, that such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of such bondage, that even if any advice is given it may be influence but not undue influence: and that one other feature to be established on materials pleaded and acts established is that the bargain is so unconscionable that it could reasonably be said that the person sought to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. *Pitchaiah Pillai* v. *Govindaswami Chettiar*[2], holds that section 23 of the Contract Act attaches itself only to an illegal contract and it does not attach itself to any illegal act outside a contract; hence where there is no term or stipulation or condition in an agreement which is in violation of any provision of law, the agreement is not hit by section 23. *Kamala Sugar Mills Ltd.* v. *G. B. Bhahan Singh*[3], points out that public policy is not an immutable doctrine and with the passage and march of time it changes and has to change; that unless the Court is satisfied on the pleadings and the evidence let in that the bargain contained in a contract is so irrational, unconscionable, illegal and avoidable the normal course of a contract ought not to be stemmed, but on the other hand the Court should aid to follow up such contracts and ease the method to implement them; that section 23 provides the basis for Courts to find whether a contract is opposed to public policy: that the foundation on which the principle of public policy is based is that no Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, but it is always necessary that the Court's conscience should be satisfied that the illegality, immorality or irrationality complained of in a contract goes to the very root of the matter and shakes its foundation; that commercial transactions couched in easy and understandable language and contained in a contract have to be respected according to their tenor; that Courts ought not to be astute to defeat the efficacy of such documents or destroy such bargains; that while interpreting a commercial contract a broader outlook has to be adopted and care should be taken to avoid an artificial and unreasonable approach in the matter of understanding the meaning and purpose of such documents; that in such cases the Courts should occupy the chair of the contracting parties and reasonably understand their minds and intents; that if after such an approach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if *ex facie* the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene and will not implement such bargain; and that a clause in a contract vesting a right in the seller to accept or reject orders formally booked by its representatives and a clause whereunder a higher price can be demanded by the seller under certain circumstances cannot be whittled down and thrown out as clauses opposed to public policy. *Dorairaj* v. *Rajan*[1] states that under section 23 an agreement is lawful unless it is forbidden by law or the Court regards it as opposed to public policy; that except in cases where the law forbids it with a view to the protection of the public, normally the Court may enforce the con-

1. (1977) 2 M.L.J. 179.
2. (1977) 1 M.L.J. 107.
3. (1977) 1 M.L.J. 149.

1. (1977) 1 M.L.J. 198.

tract and that where the parties entered into a partnership for running a touring cinema under the licence issued in the name of one partner completely unaware of the legal position that the partnership itself might be considered to be hit by section 23, and on the retirement of one partner the others executed a promissory note in his favour for the amount due to him which represented the amount which the retiring partner had paid to the other partners, the latter were bound to return the money under section 65. *Sundareswaran* v. *Sri Krishna Refineries*[1], lays down that a claim for compensation or damages on the part of a self-interested buyer who postponed the demand for delivery without cause but obviously with intent to gain a material advantage to himself is not just and cannot be accepted; that such a buyer cannot take advantage of undue benefit out of such a voluntary act and take advantage of a favourable market that in contracts of sale of goods if during the working or performance of the same, customs or excise duty or tax on the sale or purchase of goods was imposed by any law and such an imposition takes effect, under section 64-A of the Sale of Goods Act the seller might add so much of such increase to the contract price as would be equivalent to the amount paid or payable in respect of such tax or increase of tax and he would be entitled to sue for and recover such addition, but if the buyer refuses to pay the same either expressly or by necessary implication the buyer will be deemed to have disengaged himself from the position from which he could demand performance and consequently demand damages for non-performance. *V.E.A. Firm* v. *Indian Overseas Bank Ltd.*[2], expresses the view that when the customer, a firm, carrying on business in India had obtained accommodation from the plaintiff bankers at their Penang branch in respect of which they offered, with the permission of the Reserve Bank, Indian securities in the form of fixed deposits which the firm had deposited with the Trichy branch of the plaintiff and the customer later on asked the bankers to adjust the available securities, then the time taken by the Bank in conjunction with the Reserve Bank to adjust the amount was only in the stream of procedural process of realisation and did not have an impact upon the substantive relationship of debtor and creditor. *Madasami Nadar* v. *Virudhunagar Municipality*[1], makes it clear that in order to rest a claim under section 70 of the Contract Act, there need not be a pre-existing legal obligation on the part of the claimant to supply or serve; that so long as it is not an officious overbearance on the part of the plaintiff to intermeddle and cause the supply to be made or cause the work to be done he can claim compensation provided he did make such supply or did the work not intending to do so or supply gratuitously; that if it is clear that the plaintiff *bona fide* acted with the genuine intention of supplying the goods or doing the work, then if it is not intended to be a free or gratuitous act, he is bound to be compensated by the other party for such an overt but sincere act done by the initiating party should not go awaste since the party against whom compensation is claimed did have the benefit of the supply of the goods or the performance of the work; and that so long as the act is not illegal the jurisdiction of the Court to grant relief is always available so as to avoid unjust enrichment and also on the basis of an implied forging of a quasi-contract between the two parties. *Seth Dhanoonal Parsram* v. *Kuppuraj*[2], states that section 131 provides for a contract to the contrary because under the Act the death of the surety would operate as a revocation of the continuing guarantee in the absence of a contract to the contrary; there is no provision in section 130 for such a contract and the section in terms refers to a notice to the creditor and says that a continuing guarantee may, at any time, be revoked by the surety as to future transactions by notice to the creditor; that it is open to the parties to provide as to the manner in which notice to the creditor under section 130 is to be given; and therefore, if the parties provide for a particular method by which such a notice for revocation of the guarantee

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1. (1977) 1 M.L.J. 51.
2. (1977) 2 M.L.J. 354.

1. (1977) 1 M.L.J. 257.
2. (1977) 1 M.L.J. 86.

under section 130 has to be given such a contract is a binding contract and it cannot be brushed aside on *a priori* considerations.

Ramaswamy Padayachi v. *Rangaswami Padayachi*[1], decides that in a case of sale of property with an agreement to reconvey, if the suit for reconveyance was filed within the period agreed to under the agreement to reconvey, for execution of the reconveyance document, it is open to the intending purchaser to file the suit offering or tendering the amount in the plaint itself and stating his readiness and willingness to perform his part of the contract. *Arunachala Thevar* v. *Govindarajan Chettiar*[2], expresses the view that while section 19, clause (*a*) of the Specific Relief Act lays down the general principle that it is only a party to the contract who can be sued, in other words, the clause recognises that a stranger to the contract is not a proper or necessary party to a suit to enforce it; clause (*b*) provides exceptions to the general rule according to which a subsequent purchaser in order to successfully resist a suit for specific performance of a prior agreement for sale must establish that he is a purchaser for value without notice of the general agreement of sale and he paid consideration money for the sale before he had notice of the prior agreement; that clause (*b*) requires four elements to be proved to successfully claim the benefit of the exception, *viz.*, (*i*) that the transfer was for value; (ii) that the consideration had been paid; (*iii*) that the subsequent transferee has taken the transfer in good faith, and (iv) that both the purchase and payment of consideration had been made without notice of the prior contract; that the clause contemplates a transferee who has got a document executed, who has paid the money in good faith and without notice, who gets the document registered in accordance with the law giving retrospective effect to the transaction from the date of execution; that where a buyer paid full money before the date of execution of the deed in good faith and before the receipt of the notice of the contract of sale from a prior buyer, he is a transferee in law from the date of the execution of the conveyance within the meaning of section 19 (*b*) and the transferee is protected; that section 19 (*b*) lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to the general rule not to the transferor but to the transferee, and therefore it is clearly for the transferee to establish the circumstances which would allow him to retain the benefit of the transfer which *prima facie* he had no right to get. *Rangasami Gounder* v. *Periamuthu Gounder*[1] states that the expression ' unfair advantage ' in section 20 (2) means that it should be such that on an overall appreciation of the situation the Court should come to a conclusion that the complaining party has been tricked and that there was a designed approach on the part of the plaintiff to victimise the alleged affected party; that in the light of the *Explanation* I to the section mere inadequacy of consideration is no ground to refuse the discretionary relief of specific performance; and that even in cases where the price is grossly inadequate, Courts require an additional dose of proof that by reason of such design on the part of an avaricious purchaser the vendor has been victimised. *Fathima Bivi* v. *Sadhakatalla*[2] holds that section 33 provides that when the Court adjudged cancellation of an instrument on the ground that it was void or voidable, it had the power to call upon the plaintiff at whose instance the instrument was adjudged void or voidable to restore, so far as may be, any benefit which he might have received from the other party and to make any compensation to him which justice may require and that where a sale of property belonging to Muslim minors was made by their mother and the proceeds utilised in discharge of liabilities of the minors 'father and the sale was set aside as incompetent and void the minors should pay their share of the liability because admittedly the sale proceeds were applied for the discharge of the debts of the estate. *Saraswathi* v. *Somasundaram Chettiar*[3] points out that section 28 while providing for the remedy of

1. (1977) 2 M.L.J. 51.
2. (1977) 2 M.L.J. 431.

1. (1977) 1 M.L.J. 231.
2. (1977) 1 M.L.J. 473.
3. (1977) 2 M.L.J. 68.

rescission of the contract in the suit for specific performance has actually provided that such relief can be obtained only in the same suit and that no separate suit in respect of such relief could be instituted: that in view of the express provision contained in section 28 (1) the Court while decreeing a suit for specific performance can prescribe a time-limit for deposit of money by the decreeholder and also extend the time on an application by the parties in proper cases as is clear from the expression "within the period allowed by the decree or such further period as the Court may allow";that the decree in a suit for specific performance is in the nature of a preliminary decree and having regard to the express provisions in section 28 which constitute the statutory crystallisation of the legal position in this behalf the Court has no jurisdiction to provide that if there is a default in making the deposit within the time stipulated in the decree the suit shall stand dismissed since that will destroy the character of the decree as a preliminary decree and disable the Court from granting the relief provided for in section 28 (3).

In *Shah Dhanoomal Parsram* v. *Kuppuraj*[1] points out that the principle underlying material alteration presupposes that there was a writing to which the executant of the negotiable instrument was a party and that the writing was given the go-by by a conscious overt or covert act on the part of the creditor resulting in a material alteration to the instrument; that establishing that a negotiable instrument has been altered in a superfluous sense will not suffice to prevent the creditor from instituting a suit on such an altered instrument; and that the debtor should also further establish that there was a material alteration in the sense that what is sought to be put up in Court was not the contract between the parties and was not what was intended between the parties at or about the time it was executed.

Property law, land tenures and related legislation.

In *Arunachala Thevar* v. *Govindarajan Chettiar*[2], it is stated that the definition of 'notice' in the Transfer of Property Act includes both actual and constructive notice; that a *bona fide* contract, whether oral or written, prevails against a subsequent registered conveyance if the transferee had 'notice' of the prior contract; that a purchaser is deemed to have 'notice' of anything which he had failed to discover either because he did not investigate the title properly or because he did not enquire for deeds relating to the property; that the onus of proof lies upon the party seeking to defeat the prior contract to adduce *prima facie* evidence that he is a *bona fide* transferee for value without 'notice' but the burden is light and he may discharge it by merely denying the factum of notice on oath; and that in any case very little evidence is required to prove this fact which is negative. *Nagheetha Maraccir* v. *Govindaswami Naidu*[1], lays down that when a person had no power to transfer to another a particular property but erroneously represents that he had such power and purports to transfer title in that property to another it will attract section 43 if he subsequently acquires any interest in or title to that property; that it is no defence to the person estopped to plead that the transferee had made no proper enquiry as section 43 does not impose upon the transferee the duty of taking reasonable care; and that though the representation related to his authority to transfer an interest in the property and not to his title to the property the common law doctrine of equitable estoppel by deed embodied in section 43 will apply. *Karuppa Gounder* v. *State of Tamil Nadu*[2] makes it clear that section 53 cannot be used as a weapon; that a special procedure is contemplated by that section which is mandatory; that if such a suit is filed and brought to the portals of the civil Court of original jurisdiction, then the creditor concerned should contemporaneously file an application as an elementary precaution under Order 1, rule 8, Civil Procedure Code so as to make it appear that he was instituting the suit not on his own behalf but on behalf of or for the benefit of the general

1. (1977) 1 M.L.J. 86.
2. (1977) 2 M.L.J. 431.

1. (1977) 1 M.L.J. 411.
2. (1977) 2 M.L.J. 55.

body of creditors; that the mandate which is compulsive cannot be bypassed and the sole creditor who comes to Court after a period of four years cannot be permitted to convert the suit which is initially defective into one which comes within the purview of Order 1, rule 8 of the Civil Procedure Code; that the words 'a creditor' and 'shall be instituted' appearing in para 4. of section 53 (1) of the Transfer of Property Act do not have a clear bearing upon the interest and content of a peculiar procedure contemplated under the Act; and that if a litigant including the State wants to avail the special procedure under the Transfer of Property Act, then it is necessary for the plaintiff in such suit to strictly adhere to the manner and method by which such suit could be brought to the portals of a Court of original civil jurisdiction avoiding the Court exercising insolvency jurisdiction. *Alagappan* v. *Kalyarasundaram Iyer*[1] states that the law which has so far developed and is likely to develop hereafter in respect of equitable mortgages should be confined to the particular facts of those cases; that if there is evidence which would compel the Court to hold that under a single bargain the borrowing and the deposit of title deeds were effected and the intention is made clear and public only in such a contemporaneous transaction, then a memorandum evidencing such a bargain needs registration; that a recital in the memorandum as to the quantum of the amount borrowed would not make the memorandum any the less a registrable document provided it is an independent transaction and not the sole bargain to evidence the deposit of title deeds, that the only important feature on which the Court should pay its concentrated attention is that the deposit of title deeds should have taken place earlier than the time of the writing of the memorandum: that if such a dissociation in point of time is apparent from the memorandum itself or if it could be discovered from the totality of the facts and appreciation of the surrounding circumstances, then the plaintiff can successfully pilot his case on the foot of an equitable mortgage and obtain a mortgage decree; if however the Court is not satisfied about the earlier deposit of title deeds and the memorandum projected is the only piece of evidence whereby the equitable mortgage is created the Court has to hold that such a memorandum is not admissible in evidence for want of registration.

Vaiyapuri Gounder v. *Kaliarna Gounder*[1] lays down that in an agreement to reconvey, the understanding to reconvey the properties should form part of the bargain of the original sale of the properties; that constitutes the very essence of the agreement to reconvey; once that understanding is absent, the mere fact that subsequently an agreement was entered into between the two parties who happened to be the vendee and the vendor under the earlier transaction will not convert the agreement into an agreement to reconvey and it will remain and continue to be an agreement of sale of immovable properties simpliciter. *Mohammed Ismail* v. *Alagappa Chettiar*[2] expresses the view that if by process of law or by a compelling situation sanctioned by law, the security given to a creditor metamorphoses itself and changes into something other than the property which constituted the original security, then a mortgagee or chargeholder over the quandom property can trace his right to such metamorphosed security under the doctrine of substituted security enunciated in section 73 of the Transfer of Property Act. *Ponnaih Thevar* v. *Nallayam Perumal Pillai*[3] makes it clear that where the position of the alleged lessee is struck by section 76 (*a*) of the Act, such alleged lessee is not a tenant at all at the time when he is inducted on the land as tenant whatever else he may be. *Abdul Hamid* v. *Rangaswami Chettiar*[4] points out that section 106 requires the notice to expire with the end of the month and where the tenant was asked to deliver possession on the 30th November, which would be at the last moment of the day, the notice would be in order. *Renga Iyengar* v. *Sivaswami Pandaram*[5] states that parts of sections 109

1. (1977) 2 M.L.J. 291.

1. (1977) 1 M.L.J. 11.
2. (1977) 1 M.L.J. 76.
3. (1977) 2 M.L.J. (S.C.) 1.
4. (1977) 1 M.L.J. 452.
5. (1977) 2 M.L.J. 265.

110 and 111 of the Transfer of Property Act contain mere rules of procedure or rules of a technical nature; to state that sections 105 to 116 of the Act are founded upon principles of reason and equity is not either correct or precise; to the extent that those sections give statutory recognition to the principles of justice, equity and good conscience they are applicable also to cases not governed by the Act; if a provision of the section in the Act is considered as a statutory recognition of the principles of justice, equity and good conscience that would be applicable to agricultural leases also and, when a tenant was in possession on the basis of a lease for an indefinite period he was entitled to assume, and justly, that he would be permitted to continue so long as he paid the rent and complied with the conditions of the lease and if the landlord wanted to terminate the lease in those circumstances it was really just and necessary that he should intimate and terminate the tenancy so, that the tenant could be put on notice that the tenancy was going to come to an end. *Meenakshisundaram* v. *Paul Asari*[1] decides that where the case was not one of forfeiture but of determination of tenancy there is no scope for the application of section 114 of the Transfer of Property Act and where the tenant had been a chronic defaulter there was no scope for exercising any equitable powers for the purpose of relieving the tenant from eviction.

Nachar v. *Palanisamy*[2], expresses the view that where the grant of land was for service to be performed by keeping the kist collections in a village safely and remitting them into the treasury, the other members of the family of the grantee would not be entitled to any interest in the service inam, irrespective of whether they rendered service or whether they were fit to render service in relation to the kist collections of the village; that the office-holder was entitled to the inam exclusively when the service was abolished and he alone had become entitled to the property exclusively by nature of the grant of patta after enfranchisement; and that the property could assume the character of joint family property in his hands and would be joint family property of his branch if the enfranchisement had been made in favour of any of his heirs after his death.

1. (1977) 1 M.L.J. 537.
2. (1977) 2 M.L.J. 305.

Venkataswami v. *Ramireddi*[1], points out that a landholder in order to be entitled to a ryotwari patta under section 13 (1) (*b*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act must prove that he has cultivated the land himself or by his own servants or hired labour from 1st July, 1945 and has been in direct and continuous possession of the land from that date, and that the requirement of the provision is not satisfied if the landholder is merely able to show that there was an intention to cultivate or resume the land for cultivation. *Kasi Viswanathan Chettiar* v. *Chinnaiah Chettiar*[2] lays down that if the person who claimed patta under section 19-A was found to be a trespasser and not a person admitted to possession by a landholder, then he could not be given a patta under that section; that even where the Government chose to issue a patta to such a person it could not be treated as one under section 19-A; that it would be in the nature of an assignment or a charge-grant; that the pre-requisite for the applicability of section 19-A was a legal possession by admission by the landholder of communal land; and that where the patta was issued in the name of the defendant who as the eldest member of the joint family was in possession and management of the entirety of the joint family properties, he could not rely on the issue of the patta in his name alone as conferring on him or entitling him to any right in the property and the patta will enure to the benefit of the joint family. *Satyanarayana Rao* v. *State of Tamil Nadu*[3], states that in order to come within the definition of an inam estate, three conditions will have to be satisfied; firstly, the grant should be of both the warams or of the melwaram to a person already owning the kudi-

1. (1977) 1 M.L.J. (S.C.) 1.
2. (1977) 2 M.L.J. 524.
3. (1977) 1 M.L.J. 302.

waram thereof, secondly, it should be of the whole village or named village and thirdly, the grant should have been made. confirmed or recognised by the British Government; where the grants of two minor inams and portion of the village remaining thereafter were confirmed by the Inam Commissioner separately and three separate title deeds were issued and the Inam Commissioner had recognised by confirmation of the part of the village the title of the grantee derived from the original grant, it could not be said to be a confirmation of a whole village; that if the grant was of a specified fraction of a village or a specified number of shares in a village, the inam could not be covered by the definition of "inam estate" under section 2 (7) of the Madras Act XXVI of 1948 and it would not also be an 'existing inam' in section 2 (4); it is only those inams that were sought to be covered under section 2 (11) of Madras Act XXVI of 1963; if 'part inam village' is understood as literally meaning any part of a village then, that will directly come under *Explanation* 1 (*b*) to section 2 (11); and all those inams which related to a part of a village or with reference to a specified extent of land would be covered by the definition of 'minor inam' in Madras Act XXX of 1963 and they would not be 'part village inam estate' under section 2 (11). *Mayuranathaswami Devasthanam* v. *Jagadeesa Thevar*[1], holds that the Minor Inams (Abolition and Conversion into Ryotwari) Act of 1963 provides for the acquisition of the rights of inamdars in minor inams in the State of Madras and the introduction of ryotwari settlement in such inams as stated in the preamble to the Act; that the Government shall not dispossess any person of any land in the inam estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta pending the decision of the appropriate authority; that even before the grant of ryotwari patta the possession by any person of any land in a minor inam is protected if the Government considers that he was *prima facie* entitled to ryotwari patta; that to that extent there is a restriction of the vesting of the estate; that once a patta is issued the grounds on which it had been granted cannot be probed into in execution proceedings; and that a combined reading of sections 3 (*b*) and 13 of Act XXX of 1963 shows that the buildings in an inam do not vest in the Government under section 3 (*b*). *State Wakf Board* v. *Ibrahim Sahib*[1] makes it clear that 'kyrati' is a term applied to inams held for personal benefit by Mahomedans and it is more specifically applicable to grants or alms given by or to Mahomedans; kyrati zamin signifies lands given in charity, and therefore, where the grant is a personal grant it could not be a wakf.

In *Ponniah Thevar* v. *Nellayan Perumal Pillai*[2], the Supreme Court points out that a life estate holder is entitled to create a tenancy and such a tenancy could extend beyond the life of the life estate holder; the contrary view will run counter not only to the principles underlying the creation of statutory tenancy rights in agricultural land throughout the country but will also conflict with the particular statutory protection conferred upon cultivating tenants in the State of Tamil Nadu; the statutory definition of 'landholder' relates not only to the person creating the lease but contemplates and takes in every successive holder who could be entitled to evict a tenant; that person can only be one who has the right at the time of filing the suit to realise rents or evict persons in wrongful occupation; there is nothing in the Madras Cultivating Tenants Protection Act to show that the protection given to the cultivating tenant as defined in the Act was given only against his original lessor and did not extend to subsequent holders of land occupying the capacity of the landlord; the provisions of the Act show that they became enforceable as soon as the Act became operative and there is nothing in the Act to show that it ceased to be operative at any time or was limited in its operation only as a protection given to persons who were cultivating tenants in 1955. *Vellaiki Konar* v. *Kamala Devi*[3]

1. (1977) 1 M.L.J. 336.

1. (1977) 1 M.L.J. 324.
2. (1977) 2 M.L.J. (S.C.) 1.
3. (1977) 1 M.L.J. 353.

lays down that if privileges are granted by statutes on account of certain policies and for the reason that they should benefit a ryot or a cultivating tenant then, the person seeking such benefit should not only be alert but certainly not guilty of laches or negligence; the condition precedent for the Court or competent authority to act and decide under section 3 (3) of the Tamil Nadu Cultivating Tenants' Arrears of Rent (Relief) Act is that there must have been an earlier adjudication or pronouncement on the question whether the cultivating tenant has paid or deposited or is deemed to have paid or deposited the correct amount as contemplated in section 3 (1) (*a*); such an enquiry or adjudication is specifically provided for in section 3 (1) (*c*); whereas such a delve into the matter is conspicuously absent in section 3 (3); the stage at which the question as to the correctness of the deposit or the form of payment has to be adjudicated upon is when the tenant applies for relief under section 3 (1) (*a*), (*b*) and (*c*) and not under section 3 (3) of the Act; it may be that tenant can ask for the consequential relief even in an application under section 3 (1) (*c*), but when he independently applies under section 3 (3) and asks for an enquiry as to whether he has paid or deposited the correct amount of current rent, then, it cannot be said that in an enquiry under section 3 (3) such an adjudication on the correctness of the deposit or payment is also possible; what has to be done under section 3 (3) appears to be that the Court or the competent authority should be satisfied that there was a quandom or prior adjudication on the question whether the correct rent has been paid or deposited in accordance with section 3 (1) (*c*); if proof of such adjudication is forthcoming then the Court or the competent authority has to automatically allow the application under section 3 (3) and grant the guaranteed relief to the cultivating tenant; and under section 3 (3) there is no legal obligation on the part of the competent authority to enquire into the question whether the payment or deposit made was not correct. *Sankaralinga Thevar* v. *Thirumalammal*[1], states that where on the date the civil Court passed its decree and judgment declaring a person as cultivating tenant, section 16-A of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act was not in force and the jurisdiction of the Civil Court was not barred, such decree and judgment can be set aside only by procedure known to law and any other tribunal constituted by law cannot act in such a manner as to set aside the decree and judgment passed by the civil Court.

1. (1977) 1 M.L.J. 189.

Insolvency law: In *Munirathinam Naidu* v. *Messrs. Meera Financiers*[1], it is pointed out that the Presidency Towns Insolvency Act has not defined the term 'business', that the trend of judicial decisions has been in favour of enlargement rather than restriction of the connotation of trade and business and that so long as the liabilities incurred in the course of a business remained unchallenged the business activity should be deemed to continue. *Epoh I.O.B.* v. *Mohamed Musthaba Sahib*[2] expresses the view that the vesting of the property of a debtor under the Provincial Insolvency Act will not have the effect of vesting his property in a foreign country, the foreign Court cannot direct the vesting of the debtor's properties in India at any rate so far as immovable properties are concerned as the doctrine of *lex situs* is applicable; likewise so far as immovable property is concerned, the adjudication of the debtor will have no effect on the insolvent's immovable property in a foreign country and such property will not vest in the official assignee; hence there being no bar to execution under section 44-A, Civil Procedure Code, execution will lie. *Devayee* v. *Ramaswami*[3] holds that a claim to maintenance is being incapable of being fairly estimated and would squarely fall under the proviso to section 33 (1) and section 34 (1) of the Provincial Insolvency Act, as being a debt which would have to be excluded from the schedule on the ground that its value was incapable of being fairly estimated; hence, section 28 (2) of the Act became inapplicable and a suit for maintenance will not be barred under that

1. (1977) 2 M.L.J. 399.
2. (1977) 1 M.L.J. 349.
3. (1977) 1 M.L.J. 80.

provision; and whatever remedy the wife might have to proceed against her husband's salary to the extent permitted under section 60, Civil Procedure Code was not taken away by the Insolvency Act *Official Assignee* v. *Suresh Electric Company*[1] states that in order to invoke the principle of reputed ownership under section 52 (2) (*c*) of the Presidency Towns Insolvency Act not only must the property be goods that should be in the possession of the insolvent but it should have been used in his trade and what was even more important was that it should have been so used in the circumstance that the insolvent was the reputed owner of the goods.

Hindu law and related legislation.—In *Kandammal* v. *Kandiah Thevar*[2], it is held that a gift of ancestral property made by a Hindu father to his wife at a time when a son had been conceived by her and was in his mother's womb is void *ab initio* and not merely voidable; the son need not set aside the gift within 3 years after attaining majority or within the extended period of 12 years under Article 109 of the Limitation Act; failure to do so will not extinguish his rights under section 27 of that Act; and his possession of the concerned property will be in his own right. In *Commissioner of Wealth tax* v. *Sridharan*[3] the Supreme Court makes it clear that legitimate children of a Hindu father by a Christian mother who are brought up as Hindus would be governed by Hindu law; that where the son was brought up as a Hindu member of the family to which his father had belonged the son was a Hindu and could validly be a member of a Hindu undivided family headed by his father and be governed by Hindu law; that section 21 of the Special Marriage Act, 1954 guarantees *inter alia* to the issue of the person whose marriage has been solemnised under the Special Marriage Act a collateral statutory right of succession to the estate of the latter in case he dies intestate; that it does not in any way impair or alter the joint family structure between such person and his son; nor does it affect the discretion vested in the Hindu person to treat his properties as joint family properties by taking into his fold his Hindu sons so as to constitute joint family properties *Jayaramachandra Iyer* v. *Thulasi Ammal*[1] decides that where there was proximity between sale of joint family property and purchase of a house in the name of one of two brothers and the amount received under the sale was far in excess of what had to be paid for acquiring the house coupled with the fact that the two brothers were living amicably in the same house though having separate mess and belonged to an undivided Hindu family, a presumption arises that the acquisition of the house was with joint family funds and the property acquired enured to the benefit of the family. *Pattammal* v. *Nagarajan*[2], states that where one purpose of the sale of property by the karta of a joint family was to avoid paying interest on a mortgage debt and secondly, there was no other means by which the mortgage debt could be paid off and the property was an indivisible property subject to the mortgage, it cannot be said that there was no legal necessity to sell the entirety of the property and the sale cannot be questioned by the sons. *Soundarathammal* v. *M.A.B.M. Sangam*[3] holds that before a temple or a shrine or other holy place can be accepted and recognised as a place of public religious worship there should be evidence of dedication of the same for the benefit of the Hindu community or a section thereof the guidelines are that it should be a place of public worship, there should be acceptable proof of dedication, and/or the worshippers have been using as of right the religious institution as a place of public worship; merely because the members of the public are allowed to attend religious festivals and ceremonies it cannot straightaway be said that such user was due to an inherent or acquired right of the public to visit the shrine and offer worship; and the mere fact that Hindu worshippers have been freely admitted to the temple does not prove the temple to be a public institu-

[*To be continued*]

1. (1977) 1 M.L.J. 36.
2. (1977) 1 M.L.J. 121.
3. (1977) 1 M.L.J. (S.C.) 5.

1. (1977) 2 M.L.J. 461.
2. (1977) 2 M.L.J. 286.
3. (1977) 1 M.L.J. 125.

tion, because the consonance of Hindu sentiment and practice is not to turn away worshippers even in private temples. *Munuswamy Achari* v. *Rajambal Ammal*[1] points out that the accepted position under Hindu law is that where a limited owner succeeds to an estate, the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day and the inevitable corollary is that it is only the law in force at the time of the death of the limited owner that should govern the case; to hold that the old Hindu law applies to such a case is to allow the imagination to boggle. *Animuthu* v. *Gandhiammal*[2] makes it clear that a combined reading of the provisions of the Hindu Adoptions and Maintenance Act, the Hindu Women's Rights to Property Act and the Hindu Succession Act shows that when there is no factual obtaining of a share in coparcenary property a widow could claim maintenance against the coparcenary property from her father-in-law; the quantum of liability of the father-in-law depends on his means to do so from any coparcenary property in his possession under the proviso to section 19, clause (1) of the Hindu Adoptions and Maintenance Act; and though her right to a share both in the separate and self-acquired property as well as the interest in the coparcenary property of her husband is not liable to be divested on the ground of her re-marriage, her right to maintenance under sections 19 and 22 will cease on such re-marriage. *Amritham Kudumban* v. *Sornam Kutumban*[3], lays down that the right to set aside an alienation of a minor's property by the guardian is available under section 8 (3) of the Hindu Minority and Guardianship Act, 1956, not only to the minor himself but also to any person claiming under him which latter expression includes a transferee of the minor. *Duraisamy Naicker* v. *Balasubramanian*[4] states that irrespective of the existence of a natural guardian, a Hindu mother can appoint a guardian for her minor children in respect of her separate property bequeathed to the minors under a will and the testamentary guardian cannot sell such property without the prior permission of the Court even though section 28 of the Guardian and Wards Act authorised the testamentary guardian to sell the property inasmuch as under section 5 (*b*) of the Hindu Minority and Guardianship Act any other law in force immediately before the commencement of the Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act.

1. (1977) 1 M.L.J. 371.
2. (1977) 2 M.L.J. 379.
3. (1977) 1 M.L.J. 1 (F.B.)
4. (1977) 2 M.L.J. 92.

Law of evidence : In *Muruswami Naidu* v. *Thyagaraya Chettiar*[1], it is held that merely because the Oaths Act of 1873 had been repealed what was stated on special oath would not cease to be evidence; the fact that the plaintiff had given a statement under special oath will not deprive its status as evidence and it cannot be said that because he had taken a special oath he is in a worse position than if he had taken an ordinary oath. *Abdul Kareem Hajee* v. *Director Enforcement Directorate*[2] states that quasi-judicial tribunals are not bound by technical rules of evidence but the principle shutting out hearsay evidence is not a mere technical rule coined by the Evidence Act but is a rule of natural justice; for oral evidence to be of any value it must ordinarily flow from a witness who can be held responsible for its truth (which can be sifted through cross-examination) so that, in acting upon it, the Tribunal concerned may not start with an initial hesitancy; when a piece of evidence is such that there is no *prima facie* assurance of its credibility it would be dangerous to act upon it and hearsay evidence being evidence of that type has to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act. *Associated Cotton Traders Ltd.* v. *Union of India*[3] expresses the view that the maxim *res ipsa loquitur* is a rule of evidence which it is convenient to apply in those circumstances in which a plaintiff in negligence discharges his task of establishing want of care on the part of the defendant without having to prove any specific negligence or omission by the de-

1. (1977) 1 M.L.J. 358.
2. (1977) 2 M.L.J. 47.
3. (1977) 2 M.L.J. 335.

fendant ; when all the facts are known there is no room for the application of the maxim but when all the facts are not known the maxim helps the plaintiff to discharge the onus which lies upon him of proving negligence ; and the effect of the invocation of the maxim is that the mere happening of an accident affords reasonable evidence in the absence of explanation by the defendant that it was due to the defendant's negligence. *Nataraja Deekshidar* v. *Aiyathurai Padayachi*[1] holds that casting the burden of proof wrongly amounts to a substantial error in procedure. *G.P. Damani* v. *Trustees, Port of Madras*[2], expresses the view that under the Commercial Documents Evidence Act of 1939 the statement contained in a protest note can be presumed to be accruate and it is *prima facie* evidence. *Sethurathnam Pillai* v. *Lucy Baskara Josephine*[3] states that the presumption of marriage taking into account long cohabitation being a rebuttable one; it is necessary to show that the man and the woman were not merely living together but professed themselves to be husband and wife and were treated as such by relations and friends ; such conduct and recognition must extend over a long period of time, and if there are circumstances which weaken or destroy that presumption the Court cannot ignore them. *Kesava Bhagavathar* v. *Varadayya Bhagavathar*[4] lays down that if there is an oral agreement to receive a lesser sum than what was due under a mortgage deed such agreement will be hit by the proviso to section 92 (4) of the Evidence Act; if it is in writing unless it is registered it will be hit by section 17 (1) (*b*) of the Registration Act; that where the waiver of interest noted in an endorsement not having been registered is inadmissible in evidence the endorsement is admissible so far as it related to the acknowledgment of receipt of the amount paid on that date; the production of the bond by the defendant with the endorsement of payment only casts on the plaintiff the burden of proving that the debt was still outstanding ; the presumption under section 114 in such cases is only a rebuttable presumption and the plaintiff could not be non-suited solely on the ground that the original bond was produced by the defendant.

1. (1977) 1 M.L.J. 297.
2. (1977) 1 M.L.J. 32.
3. (1977) 2 M.L.J. 141.
4. (1977) 1 M.L.J. 528.

Law of limitation : In *Ramanathan Ambalam* v. *Shanmughavel Pillai*[1], it is pointed out that the law of limitation has to be interpreted grammatically, there is no scope for equity in it, nor is there any intendment in it; the period prescribed in the various Articles in the Limitation Act starts in accordance with the tenor and language of the concerned Article and there is no scope for argument based on reasonableness, nor can there be any ground for complaint of hardship when such a period prescribed under the law of limitation works itself out and confers a benefit on one and takes away the right from another. *Chinnaiah Kounder* v. *Kattayya Kounder*[2] holds that section 6 of the Limitation Act shows that minority does not in any way affect possession being adverse ; though *prima facie* under Article 65 read with section 6 (1) a suit for recovery of possession could be filed by the minor within 12 years from the date when he attained the age of majority in case the impugned transaction was void, by reason of section 8 such a suit will have to be filed within 3 years of attaining majority and the minor could claim the extended period of 12 years ; the period of limitation therefore for recovery of possession by a minor in respect of a void transaction is 12 years from the date of sale or 3 years after he attained majority whichever is longer ; and where whether it is three years of attaining majority by the minor or 12 years from the date of sale the period had already lapsed by the time the plaintiff (the person in possession) filed his suit for a declaration of his title, in effect the suit is for a declaration that the defendant is not entitled to recover possession of the property from the plaintiff and that his remedy is lost or his right is extinguished and the suit construed in that manner is maintainable. *Govindaswamy* v. *Bhoopalan*[3] decides that section 5 of the Limitation Act is applicable to an application

1. (1977) 1 M.L.J. 168.
2. (1977) 2 M.L.J. 382.
3. (1977) 1 M.L.J. 411.

under section 9 of the Madras City Tenants Protection Act of 1922 because, under section 29(2) of the Limitation Act, 1963 where any special or local law prescribed for any application a period of limitation different from the period prescribed in the Schedule, the provisions of section 3 of that Act shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for such application, the provisions contained in sections 4 to 24 shall apply unless the applicability of any of these provisions is excluded or modified. *Nageetha Maracair* v. *Govindaswami Naidu*[1] points out that the period of limitation to enforce a liability under sections 65 and 235 of the Contract Act will commence from the date of discovery of the fraud or misrepresentation and Article 55 of the Limitation Act, 1963, will apply. *Muthalu Ammal* v. *Amudam*[2] states that the alienation contemplated by Article 60 of the Limitation Act is alienation by a lawful or *de jure* guardian and alienation made by a *de facto* guardian is not covered by the Article. *Mayava Kounder* v. *Subbaraya Kounder*[3] holds that to enable a co-owner to acquire title to the entirety of the common property to the exclusion of the other co-owners by prescription, the co-owner in possession must assert hostile title to the knowledge of the co-owners out of possession and in the absence of assertion of such hostile title to the knowledge of the co-owners out of possession there cannot be any acquisition of title by prescription by the co-owner in possession. *Nagamalai Thevar* v. *Pandaram*[4] states that symbolic delivery of possession is binding not only against the parties to the record but also against the legal representatives of a party to the record and such symbolical delivery of possession will arrest adverse possession by the latter. *Veerayya Pillai* v. *Ramanatha Iyer*[5], lays down that whatever might be said with reference to a transfer effected subsequent to an attachment, adverse possession which had already commenced would not be stopped or prevented by such attachment alone without bringing the property to sale before the expiry of the period of limitation. *Munuswamy Achari* v. *Rajammbal Ammal*[1] expresses the view that Article 65 read with *Explanation (b)* to that Article applied generally to all suits by Hindu plaintiffs, where the right to possession is claimed on the death of a female Hindu; the claim may be that of a reversioner of the last male holder or it may be that of an heir of a deceased female Hindu; whatever be the case provided the right of possession in the suit property is claimed on the death of a female Hindu, the deeming provision of *Explanation (b)* to Article 65 would operate and the suit for possession would be within time if filed within 12 years of the death of the female Hindu on whose death the plaintiff claims possession.

1. (1977) 2 M.L.J. 206.
2. (1977) 2 M.L.J. 215.
3. (1977) 1 M.L.J. 113.
4. (1977) 2 M.L.J. 392.
5. (1977) 1 M.L.J. 313.

Civil Procedure Code.—In *Karuppammal* v. *T.U. Poosari*[2], it is held that if, in a suit for partition where the dispute between the parties was about the share and the extent which each one of them was entitled to, there was an erroneous declaration of the shares or even as to allotment of a certain extent, the proceedings of the Court will not be without jurisdiction; the civil Court has ample jurisdiction to decide an issue rightly or wrongly and that would not make the decision one without jurisdiction. *Ramanathan Ambalam* v. *Shanmugavel Pillai*[3], points out that to invoke *Explanation* V to section 11 of the Code of Civil Procedure, the grant of relief by the concerned Court should be on a full and final adjudication of the rights of parties after a considered appreciation of the relative contentions; where no relief as such is granted but on the other hand the contesting plaintiff does not press for such relief and the Court sitting in judgment over the particular *lis* considers that it was not necessary for it to grant or refuse any such relief asked for on the

1. (1977) 1 M.L.J. 371.
2. (1977) 1 M.L.J. 360.
3. (1977) 1 M.L.J. 168.

ground that no relief was asked for against a particular defendant in action, then, in such a situation, it cannot be said that the Court granted relief; such a grant should be on a full examination of the merits of each claim before the Court and after a proper adjudication giving a reasonable impression that the Court applied its mind and came to the conclusion that the relief should or should not be granted; and it is in this context that the language in *Explanation V* in section 11 which says that any relief claimed in the plaint which is not expressly granted by the decree should for the purpose of this section be deemed to have been refused, has to be understood. *Sreepathi Hosiery Mills* v. *Chitra Knitting Company, Tiruppur*[1] makes it clear that section 20 of the Code appears to be omnibus in nature and is subject to the limitations mentioned in the Chapter where it is placed; one such limitation is that contained in section 19 under which whenever a suit for compensation for wrong done to person or movable property is filed, the option is with the plaintiff to institute the suit based on such cause of action, at the place where the defendant resides or works for gain or at the place where the wrong was committed; there is no way out of this limitation as to jurisdiction envisaged in section 19; when the Code, which more or less lays down the substantive law though procedural in aspect regarding such matters of jurisdiction, creates certain peripheries and limitations particularly in the matter of laying suits in the forum of specified Courts, then no option is left to the litigant except to strictly adhere to such prescription in the Code; he cannot whittle down the express prescription in section 19 and lay emphasis on the oral evidence casually let in by him so as to create or vest jurisdiction in the Court which has none. *Poomalai* v. *Ramalingam*[2] states that on the passing of a decree for possession of the property, the judgment-debtor was under a liability to hand over possession of the property as it was on the date of the decree; if at the time of delivery it was found that the property decreed had depreciated in value by the positive and wilful conduct of the judgment-debtor, then the question how far the judgment-debtor could be liable for causing such depreciation in the value of the property could be dealt with as an issue arising in execution, as it fell within the scope of the expression "discharge or satisfaction of the decree"; and the plaintiff's application claiming damages was maintainable under section 47 of the Code. *Nachimuthu Chettiar* v. *Morthammal*[1] expresses the view that if the executing Court proceeds to execute the decree notwithstanding the pendency of an application by the judgment-debtor under section 20 of the Tamil Nadu Agriculturists Relief Act, 1938, claiming to be an agriculturist, it is contrary to section 20 which is a mandatory provision and, therefore, an application for setting aside the sale of the judgment-debtor's property held in contravention of section 20 would be under section 47 of the Code of Civil Procedure. *Ramaswami Naicker* v. *Jagadeesan*[2], decides that where the person claiming rateable distribution had filed an execution petition in a Court of superior jurisdiction to the Court in which the property was brought to sale and sold in auction and which held the said process, the provisions of section 63 read with section 73 are applicable, and the petitioner will be entitled to rateable distribution; he may call for the assets held by the Court of inferior jurisdiction to the credit of his suit in the higher Court and claim the amount due to him and it is for the respondent to go to the higher Court and claim rateable distribution. In *State of Kerala* v *General Manager, Southern Railway*[3], the Supreme Court points out that the Railways Act does not deal with the question as to who should be impleaded as a defendant when a suit is brought against a railway administration; this is essentially a matter relating to the frame of suits and is dealt with by the Code of Civil Procedure; according to section 79 of the Code, in a suit by or against the

1. (1977) 1 M.L.J. 222.
2. (1977) 1 M.L.J. 494.

1. (1977) 2 M.L.J. 40.
2. (1977) 2 M.L.J. 261.
3. (1977) 1 M.L.J. (S.C.) 60.

Government, the authority to be named as plaintiff or defendant, as the case may be, shall in the case of a suit by or against the Central Government, be the Union of India, and the Southern Railway being owned by the Government of India, a suit dealing with the alleged liability of that railway should be brought against the Union of India. *Gopalakrishna Pillai* v. *Chinnapillai Padayachi*[1] holds that facts proved or admitted may provide evidence to support further conclusions to be deduced from them, which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law; and the Court could intervene in second appeal if it appears that the fact-finding authority had acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination in question. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[2] points out that in so far as the revisional jurisdiction under the Constitution is concerned, it has to prevail because no statute enacted under the law can make an inroad into the provisions of the Constitution, in so far as the revisional jurisdiction under section 115, Civil Procedure Code is concerned there are certain guidelines in the section itself which permit the exercise of such jurisdiction; while provision as to appeal is no doubt the creature of statute, the revisional jurisdiction is available to the complaining litigant so as to subserve the ends of justice; when the statute expressly makes an order of the subordinate Court final it means that the concerned statute is not prepared to provide another remedy against it; in such cases appeal would not lie to the higher Court by invoking the ordinary common law; and the finality of the decision in appeal under section 9-A (1) of the Madras City Tenants Protection Act, does not preclude a revision being preferred against the order. *Palaniswamy Gounder* v. *Nachimuthu Gounder*[1], makes it clear that a Court can take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstances so as not to drive them to a fresh litigation and so as to do complete justice between the parties, and, the Courts have inherent powers to give adequate relief to suitors in suitable cases in view of changed circumstances after the filing of the suit so as to shorten litigation. *K. A. M. Sheriff* v. *Ramu Reddiar*[2], states that the plaintiff in a suit cannot be compelled to implead as defendant a person against whom he seeks no relief and the Court will be reluctant to force an additional defendant into the action against his will; but, having regard to the object of the Legislature to avoid multiplicity of suits and to ensure that the matter is finally decided in the presence of all the parties interested, without delay and expenses, the trial Court has been given the power to add a person as defendant even if the plaintiff may object to such joinder. *Nataraja Iyer* v. *Nacharammal*[3], holds that under Order 5, rule 9 (2) of the Code even though the summons was sent by post, if the defendant did not appear on the day fixed on the summons, the Court has to direct that the summons should be delivered or sent to the proper officer to be served by him or by one of his subordinates on the defendant; and, that where a discretion is conferred upon the Court coupled with an obligation, the word 'may' (in Order 5, rule 9 (1)) denotes 'shall'. *E. K. M. K. Nawabjan* v. *Krishnan Chettiar*[4], takes the view that the affixture of notice of execution petition on the appellant's residence on his refusal to accept the notice appears to be due service as contemplated by Order 5, rule 17 and so long as the statutory provision contemplates service by affixture when the party refuses to receive the summons it cannot be said that there has been no proper service. *Subramania Mudaliar* v.

1. (1977) 2 M.L.J. 368.
2. (1977) 2 M.L.J. 98.

1. (1977) 2 M.L.J. 131.
2. (1977) 1 M.L.J. 517.
3. (1977) 1 M.L.J. 47.
4. (1977) 1 M.L.J. 382.

Ideal Finance Corporation[1] lays down that where the records showed that the judgment-debtors were not in their respective residences at the time the process-server called but the process-server's is report did not say that the judgment-debtors did not have any agents to receive the notices on their behalf nor did it appear that any attempt was made to serve the notices on any adult members of the family in their residences and the process-server straightaway proceeded to affix the notices stating that the judgment-debtors were out of town, it is not good service under Order 5, rule 17. *Md. Salih Sahib* v. *T. C. Adam Sahib*[2] decides that amendments to the pleadings cannot be turned down by Courts merely on the score that they introduce an inconsistent plea or a new cause of action and that the true test is whether the amendment is foreign to the subject-matter of the suit and, if not, whether it would be in the interest of justice to grant it. *Dharmasekaran* v. *State Bank of India*[3]. points out that Order 9, rule 13 sets out two alternative grounds for having an *ex parte* decree set aside in an application under that rule; the applicant can satisfy the Court that (*i*) the summons was not duly served, or (*ii*) he was prevented by any sufficient cause from appearing when the suit was called on for hearing; he could request the Court to set aside the *ex parte* decree on any of the two grounds; even if there has been a proper and sufficient service at the stage of the suit and at the stage of final decree proceedings, if he satisfies the Court that he was prevented from appearing in Court he can seek the setting aside of the *ex parte* decree. *Chidambaram* v. *Kalidas*[4] expresses the view that Order 17, rule 3, applied only where the parties were present; where, on the date of the trial, the defendant was absent the Court could not proceed under Order 17, rule 3, but should proceed under Order 17, rule 2, by setting the defendant *ex parte* and decreeing the suit after recording the evidence if the claim of the plaintiff was proved. *Palanivel Pillai* v. *Sivakolundu Odayar*[1], states that ascertainment of mesne profits in actions in which it is possible is a matter which is solely guided by the guidelines set in Order 20, rule 12; there is no escapement out of it as this is almost a prescriptive mandate and Courts cannot make inroads into it by seeking to otherwise interpret the specific and unambiguous provision; the enquiry as to rent and mesne profits can be made by a competent Court for a period commencing from the date of the institution of the suit till the expiry of three years from the date of the decree; the decree referred to may be a decree of the trial Court or the decree of the first appellate Court or the decree of a Court in the higher hierarchy as well; the decree to be reckoned is the decree which has become final in the eye of law and in accordance with the procedure available; and there is abundant authority to say that the absence of a direction as to the enquiry into mesne profits in the final decree in a suit where possession and mesne profits were asked for and both reliefs were granted will not be a fact which should weigh with the Courts to negative such an enquiry and to grant the reckoned profits after such an enquiry. *Kodikatti Nadar* v. *M.L. M. Fernando*[2], makes it clear that certification of payment under Order 21, rule 2, is possible under two different heads; it can spring from an actual payment of money by the judgment-debtor to the decree-holder or secondly by an adjustment of the said decree to the satisfaction of the decree-holder either in part or in whole; in either case, however, the *dominus litis* to bring such matter to the Court's view is the decree-holder himself since it is his responsibility to certify such payment or other adjustment and bring it to the notice of the appropriate Court who shall act accordingly, but Order 21, rule 2, does not pose an empty formality; if a case of certification or adjustment comes up before an executing Court and if the judgment-

1. (1977) 2 M.L.J. 385.
2. (1977) 2 M.L.J. 111.
3. (1977) 1 M.L.J. 271.
4. (1977) 1 M.L.J. 46.

1. (1977) 2 M.L.J. 65.
2. (1977) 1 M.L.J. 141.

debtor or the decree-holder himself is able to, satisfy the conscience of the Court then the power of the Court is available so as to make a judicious probe into the legality, regularity or truthfulness of such payment or adjustment. *Ondipudur Weavers Co-operative Production and Sales Society Ltd.* v. *Velumani*[1], holds that it is a well established rule that while the machinery and remedy provided under Order 21, rule 32 (1), would cover cases of both prohibitory and mandatory injunctions sub-rule (5) of that rule will apply only to cases of mandatory injunction because it speaks of a positive act to be done by the judgment-debtor under the decree and wherever there is no mandatory injunction directing the judgment-debtor to do a positive act the remedy open to a decreeholder is to file a fresh suit seeking a mandatory injunction. *Nawabjan* v. *Krishnan Chettiar*[2], states that rule 54 (2) of Order 21, contemplates proclamation at some place on or adjacent to the property sought to be attached or sold by beat of drum or other customary mode; it also provides for a copy of the order being affixed on a conspicuous part of the Court-house and the Court cannot suggest a more elaborate method when the method contemplated by the statute has been followed. *Sivasangu* v. *Chinnaiah*[3], explains that Order 21, rule 66, relates to the drawing up of the proclamation of sale while rule 67, relates to the publication of the proclamation and where when the proclamation was settled the judgment-debtor's valuation was noted but that first sale was adjourned for want of bidders and the Court, on the subsequent settlement of the proclamation, did not mention the upset price, that would be tantamount to his fixing the other terms of the proclamation in accordance with the terms noted in the first proclamation and the fact that, in publishing it, the other terms noted in the first proclamation were not noted such as the judgment-debtor's valuation will not be a ground to set aside the sale; Order 21, rule 72, no doubt does not provide for any notice to be given to the judgment-debtor of a petition by the decreeholder for leave to bid at the auction, nevertheless since in exercising its discretion the Court should consider all the circumstances and exercise the discretion not arbitrarily but on judicial lines it is desirable for the Court to give notice to the judgment-debtor in regard to such petition so that the Court may be in a position to consider all the circumstances of the case; and though it would not be proper for the Court to grant permission to the decree-holder to bid at the auction even when the properties are brought to sale for the first time there is no warrant for the proposition that there should be at least two such attempts to bring the properties to sale before permission to bid could be granted to the decree-holder. *Subramania Mudaliar* v. *Ideal Finance Corporation*[1], points out that the procedure enabling a decree-holder to apply to the executing Court for leave to bid and set off is governed by Order 21, rule 72; the provision is couched in a negative form to the effect that no holder of a decree in execution of which property is sold, shall without the express permission of the Court, bid for, or purchase the property; the implication is that the Court has the discretion to grant permission to the decree-holder in this regard; the details of procedure for applying for leave to bid and set off are to be found in rule 199 of the Civil Rules of Practice, according to which an application for leave to bid at the sale shall be supported by an affidavit setting forth the facts showing that an advantageous sale cannot otherwise be had and the application must include an undertaking by or on behalf of the decree-holder that in the event of his being declared the purchaser of the property he would enter up satisfaction of the decree under which the sale is made for the amount of the purchase-money; that apart from the requirement that the decree-holder should make out a case for leave to bid and set off the executing Court must

1. (1977) 2 M.L.J. 19.
2. (1977) 1 M.L.J. 382.
3. (1977) 1 M.L.J. 134.

1. (1977) 2 M.L.J. 385.

itself be satisfied on the facts that such leave would be necessary for obtaining the most advantageous price in execution sale; it is settled law that an order passed by the executing Court allowing the decree-holder to bid and set off is a matter of great moment which vitally affects the property of the judgment-debtor and that this aspect by itself without more shows that it would be not only just but also necessary that the judgment-debtor should be notified of the decree-holder's application before any order is made against him. *K. A. M. Sheriff* v. *Ramu Reddiar*[1], holds that in a case where the validity of a revenue sale has been challenged only on the ground of irregularity it can be said that the Government need not be made a party as they can in any event bring the property to sale once again even if the sale is set aside on the ground of irregularity in the conduct of the sale but where the plaintiff's case is that there are no arrears of land revenue but none the less his property has been sold the Government is a necessary party to the suit. *Nawabjan* v. *Krishnan Chettiar*[2], decides that an execution sale of a property cannot be set aside merely on the ground that the price fetched by the sale is somewhat low or that it will fetch a higher price if resale is ordered. *Marimuthu* v. *Ambujam Ammal*[3], lays down that the relevant date for the purpose of finding out as to when the sale takes place in Court-auction in the course of execution of a decree is the date of the sale and not of its confirmation. *Alagappan* v. *Kalyanasundaram Iyer*[4], makes it clear that though the grant of interest on the costs of the action was available before the passing of the Central Act LXVI of 1956, yet after the date of the said enactment a mortgagee is not entitled to interest on the costs of the suit. *Baba Industries* v. *Mehta Traders*[5], states that the principle to be applied in the matter of grant of leave to defend is that if the Court is satisfied that the defence of the defendant is acceptable though *prima facie*, and also if the defence raises triable issue, thereby indicating that the defendant has a fair or *bona fide* or reasonable chance of success, or if the state of affairs is such that the Court is reasonably led to the conclusion that the trial of the action only can establish the truth, *bona fide* or otherwise, of the defence raised, then in such circumstances, the Court ought not to impose a condition in the matter of the payment of the plaint amount sought for by the plaintiff into Court, as security, before the grant of such leave. *Sri Krishna Textiles* v. *J. R. Exports*[1], holds that the fact that the defendant suffers a decree and prays for the satisfaction of the same by paying moneys at stated intervals or in monthly instalments would not alter the situation or wipe off as a matter of course the legal effect of the prior order of attachment before judgment of the properties of the judgment-debtor which was issued by a competent Court in a situation which compelled the Court to do so; an order made Order 38 of the Code, is independent and is not capable of being telescoped to an order permitting the defendant to pay the decree amount in monthly instalments or at stated intervals which might be passed by the trial Court on a written or oral application made by the judgment-debtor at about the time when the defendant suffers a decree by consent; and if therefore the two orders are not inter-dependable but are independent it cannot be contended that an independent order passed by a competent Court under Order 38 works itself out and becomes ineffective thereafter. *V. V. Devasthanam* v. *Arumugha Mudaliar*[2] lays down that where a receiver was appointed without any time limit there is in law nothing to prevent the receiver to take charge and then discharge his duties as directed by the Court and that until a receiver is actually discharged he could continue to function. *Ananthakrishnan Nair* v. *Dr. Ramakrishnan*[3]

1. (1977) 1 M.L.J. 517.
2. (1977) 1 M.L.J. 382.
3. (1977) 2 M.L.J. 218.
4. (1977) 2 M.L.J. 291.
5. (1977) 2 M.L.J. 479.

1. (1977) 2 M.L.J. 262.
2. (1977) 1 M.L.J. 92.
3. (1977) 2 M.L.J. 98.

points out that the accepted principle is that a receiver cannot be viewed as a substitute of parties but he also runs the race of litigation because he has been ordained to do so by virtue of his appoinment as receiver by an order of Court in that litigation; therefore even though there are receivers in an action, it cannot be said that the parties can keep silent about their rights and claim the same through the persons of the receivers; even if it be assumed that the application made by one receiver was on behalf of the other parties and other joint receivers such an application is not maintainable since each one of the parties entitled to the benefits under the concerned Act should come forward and file an application for such benefits; the appointment of a receiver does not absolve the affected party in the litigation for whose benefit the receiver had been appointed to efface himself and feel that he has no more obligation in the suit; *a fortiori* if certain rights and privileges are granted to a party to such a litigation by the beneficial provisions of a statute, then it is not the receiver who could set the law in motion on his behalf and obtain such statutory benefits or privileges and it is for the contesting party or the real party who would take advantage of the statutory concession or right to move the Court by himself. *Kasi Viswanatha Chettiar* v. *Chinnaiah Chettiar*[1] makes it clear that if an appellate Court did not dismiss the appeal summarily it should by virtue of rule 12 (1) of Order 41, fix a day for hearing of the appeal and therefore the Court could not admit the appeal in part and dismiss the appeal in part; that when the matter comes up for a admission under Order 41, rule 11, only two courses are open to the Court namely to dismiss or admit the appeal as a whole; and if the appeal is admitted in regard to one item of the concerned properties the appellant will be entitled to question the finding if the Courts below even in regard to the other item. *Subramainia Mudaliar* v. *Ideal Finance Corporaton*[2], states that Order 43, does not provide for an appeal against an order either granting or refusing to grant to the decree-holder leave to bid and set off in an execution sale, although it provides an appeal against an order of the executing Court setting aside or refusing to set aside the sale in favour of the decree-holder. *Venkataswami Reddiar* v. *Thirukamu Reddiar*[1], decides that a review cannot be asked for merely because by reason of a subsequent decision which is binding authority, the earlier decision interpreting the provision of any statute is found to be wrong.

1. (1977) 2 M.L.J. 524.
2. (1977) 2 M.L.J. 385.

Criminal law and procedure.— In *State of Madhya Pradesh* v. *Ratan Singh*[2] the Supreme Court points out that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various jail manuals or under the Prisons Act cannot supersede the statutory provisions of the Penal Code; a sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion or remit either the whole or a part of the sentence under section 401 of the Criminal Procedure Code of 1898; section 401, confers an absolute discretion on the appropriate Government in the matter; the 'appropriate Government' empowered to grant remission is the Government of the State where the prisoner had been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; such transfer has no bearing on the application of section 401, because this is merely an executive matter and an executive decision taken to meet the convenience of the accused; when the transferee State feels that the accused has completed a period of 20 years it has merely to forward the request of the prisoner to the concerned State Government; and under section

1. (1977) 1 M.L.J. 524.
2. (1977) 1 M.L.J. (S.C.) 19.

401 of the Code of Criminal Procedure, 1898, the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.

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Ramaprasada Rao and Paul, JJ.

The Revenue Divisional Officer, Chidambaram *v.* A. R. Damodara Mudaliar, Managing Trustee of Pataleswar Devasthanam, Tirupapuliyur (in A. No. 367 of 1973).

10th October, 1977.

Appeal Nos. 367 of 1973 and 607 of 1973.

Land Acquisition Act (I of 1894), *section 9—Notices under section* 9 (2)—*Date of notice cannot be the date of service of notice without proof—Date of service of notice relevant for reckoning the period of* 15 *days available for preferring objections—Compensation — Lands described as agricultural lands in public records—Lands situate in developed neighbourhood—Valuation to be based on potential value as building site.*

The lands which were the subject-matter of acquisition were described as agricultural lands in the public records and the Land Acquisition Officer awarded compensation on that basis. But the lands were in a developed neighbourhood and were capable of being converted into building sites. On a reference under section 18 of the Land Acquisition Act, the civil Court fixed the compensation at Rs. 6,000 per acre as against Rs. 820 per acre awarded by the Land Acquisition Officer. The Government filed an appeal against the enhanced compensation and also raised the legal contention that the claimants did not prefer their objections within the time prescribed under the Act.

Held: Natural justice required that any notice to be effective and to be positive, should have been served on the person against whom it was intended and without proof of actual service of such notice, a bare inference of constructive knowledge of the obligation to prefer the claim within 15 days from the date of the notice, ought not to be pressed into service to the prejudice of the affected party. Reading sections 9 (2) and 9 (3) together, the intendment of the prescription and mandate in sub-section (2) of section 9 of the Act was to see that the notice under section 9 (2) as in section 9 (3) should also be served on the persons affected and that ought to be the date which had to be reckoned for purpose of calculating the 15 days' time available to the claimant for preferring his objections under the above sub-section. This prescription in section 9 (2) of the Act read in conjunction with the well-known principles of natural justice required that it was the date of the service of the statutory notice in any enactment which ought to be the relevant factor to consider whether the subsequent conduct of the addressee was in accordance with the statute or not.

In the case under review, there was certain potential in the land and such potential being referable to its certain future improvement as a building site, it could not be treated as agricultural land. The contention of the appellant that the lands had still to be valued only as agricultural lands could not be accepted. The Court below had rightly treated the lands as potential house sites and valued the same.

Government Pleader, for Appellant.

S.J. —— *Appeals dismissed.*

[FULL BENCH]

T. Ramaprasada Rao,
S. Natarajan and
V. Balasubrahmanyan, JJ.

The Chief Controlling Revenue Authority, Board of Revenue *v.* P. A. Muthukumar.

5th December, 1977.

R.C. No. 1 of 1976.

Indian Stamp Act (II of 1889), *Article* 58 *of Schedule I and section* 2 (24)—*Document styled as declaration trust—Whether could be treated as a settlement deed.*

The respondent, his two brothers and their father partitioned the family properties, pursuant to a compromise decree. Subsequently, the properties allotted to the respondent were orally partitioned between himself and his minor son and they have been in enjoymet of the respective shares. On 2nd July, 1973, the respondent executed a document purporting to be a private trust deed whereby he appointed his father Appaji Rao Gounder for the purpose of managing the properties worth about Rs. 49,700 and the document was drawn up as a trust deed on a stamp paper of the value of Rs. 70. Under the document no power to alienate the property by way of sale or mortgage etc., was left to the executant and it was recited that he had no authority to revoke the document. A direction was given in the document to discharge the debts incurred by the executant from and out of the income of the trust properties also. The Sub-Registrar who entertained a doubt regarding the real character of the document referred the matter to the District Registrar for adjudication under section 40 of the Stamp Act. The District Registrar adjudicated the document as a settlement deed as defined in section 2 (24) of the Act and levied the deficit Stamp Duty of Rs. 1,083.15 and a penalty of Rs. 25. The respondent preferred an appeal to the Board of Revenue against the Order of the District Registrar and also prayed that the matter may be referred to the High Court under section 57 of the Stamp Act.

Considering the circumstances and facts of the case and the recitals contained in the document and the definition of the word 'trust' in the Trust Act, it was held that that the document could be treated only as a trust deed and not as a settlement deed and answered the reference against the Revenue.

A.I.R. 1947 All. 141; A.I.R. 1964 All. 537, Referred.

Additional Government Pleader for Petitioner, Mr. A. R. Ramachandran *amicus curiae,* for Respondent.

R.S. —— *Reference answered against revenue.*

[FULL BENCH]

T. Ramaprasada Rao,
S. Natarajan and
V. Balasubrahmanyan, JJ.

Chief Controlling Revenue Authority, Board of Revenue, Madras *v.* A. Raoof Ali Khan.

5th December, 1977.

R.C. No. 3 of 1976.

Indian Stamp Act (II of 1889), *Article* 58 *of Schedule I and section* 2 (24)—*"Settlement" — Definition — Document styled as Wakf-alal-aulad — Whether could be construed as a settlement deed.*

A document dated 26th June, 1974 was presented for registration in the Registrar's Office, Coimbatore. It purported to be a trust deed in favour of Begum Hasimunisa Wakf Trust. The trust properties were worth about Rs. 64,500 and a stamp duty of Rs. 70 was paid. The document was executed by A. Raoof Ali Khan, husband of Hasi Munisa Bibi and his four sons and two daughters, in favour of the trust. The properties were owned by the said Hasi Munisa Bibi and after her demise the properties were taken possession of by her heirs. A. Raoof Ali Khan was appointed as muthavalli of the Trust. As per the recitals of the document a sum of Rs. 3,500 may be spent every year during religious functions and the trustee was allowed to meet out the expenses in connection with the repairs and for the

construction of new buildings. The remaining income of the properties was to be divided into two equal shares and distributed among the executants for their livelihood. The executants reserved no right to sell or mortgage the properties. The document was styled as Wakf-alal-aulad. The District Registrar treated the document as a settlement deed chargeable to stamp duty under Artice 58 of Schedule I, Stamp Act and levied the stamp duty and penalty of Rs. 1,417.55 and Rs. 5 respectively. The said Raoof Ali Khan filed a revision petition before the Board of Revenue and it was contended that the document was not a settlement deed, but a Wakf-alal-aulad and he requested that in case of any doubt, as to the nature of the document, the document may be referred under section 57 of the Stamp Act to the High Court.

It was submitted that the document came under Article 58 of the Stamp Act. As to the definition of 'settlement' under section 2 (24) of the Stamp Act, under the instrument in question the income of the property was to be spent every year during religious functions and the remaining income was to be divided into equal shares and distributed among the executants for their livelihood. Any testamentary disposition which is intended for the immediate benefit of any charitable or religious purposes is a settlement and the alleged wakf should be treated as a settlement under the Stamp Act.

Held, considering the facts and circumstances of the case, the document in question could be treated as a settlement deed and not as a Wakf-alal-aulad and the reference was answered in favour of the Revenue.

Additional Government Pleader, for Petitioner.

V. Ratnam, K. Srinivasan and *B. Chitra,* for Respondents.

R.S. ——— *Reference answered in favour of the Revenue.*

V. Sethuraman, J.

S. Jebaperumal *v.* Central Bank of India, Tuticorin.

13th December, 1977.

A.S. No. 542 of 1973.

Tamil Nadu Agriculturists Relief Act (IV of 1938), *section* 4 (e)— *Central Bank of India—Loan advanced under mortgage by deposit of title deeds and hypothecation bond covering banana crops —Suit by bank for balance of amount due—Claim by debtor for benefits under Act IV of* 1938*—Suit decreed—Appeal by judgment-debtor — Judgment-debtor though an agriculturist by virtue of section* 4 (e), *held not entitled to the benefits of the Act.*

The first defendant had borrowed Rs. 20,000 under a promissory note from the Central Bank of India and had also deposited his title deeds. He also executed a hypothecation bond covering his banana crops on land. Defendants 2 and 3 were the guarantors. After adjustment of the various amounts paid, the Bank filed a suit for recovery of Rs. 10,937-31 with further interest and costs. The first defendant claimed that he was entitled to the benefits of Tamil Nadu Act IV of 1938 and that the plaintiff was not entitled to recover interest at more than 6½% per annum. The trial Court held that though the first defendant was an agriculturist, he was not entitled to the benefits of Act IV of 1938.

On appeal,

Held: The 14 banks whose names were set out in the First Schedule to Central Act V of 1970 were all banks which came into existence as a result of a special enactment, *viz.*, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. They did not come into existence, and were not incorporated, under any other law. Therefore, even under the provision as it was prior to the amendment in 1973, the Tamil Nadu Act IV of 1938 did not apply to the loans advanced by a bank like this.

The Court below, therefore, was right in its conclusion that, though the first defendant was an agriculturist, he could not get the benefits of Tamil Nadu Act IV of 1938 because of the special provision of exemption under section 4 (*e*) covering loans in favour of a bank like this.

M. Veluswami, for Appellant.

K. S. Lakshmikumaran, for 1st Respondent.

S.J. ——— *Appeal dismissed.*

[FULL BENCH]

Ramaprasada Rao,
Natarajan and
Balasubrahmanyan, JJ.

The Chief Controller, Revenue Authority, Board of Revenue *v.* V. Daniel.

5th December, 1977.

R.C. No. 2 of 1976.

Stamp Act (II of 1899), *section* 2 (10) *—Document neither ambiguous nor incomplete—Recitals in the document to be generally a safe guide for interpretation —Document whether release or conveyance.*

Moneys belonging to a religious institution called the Society of Trustees which at the time was not registered and which was not formed as a Society registered under the Societies Registration Act or under any other law for the time being in force were entrusted to certain individuals for the purpose of establishing a Church and incidentally to acquire properties, both moveable and immoveable, for the benefit of the said Church. One Daniel executed such a document and he was to act as one of the trustees under that instrument. Daniel released his interest in the said properties in favour of the Society which was subsequently registered and which provided the source of consideration for the purchase of the properties forming the subject-matter of the instrument and which at all material times were intended for the benefit of the Society. The recitals as such in the instrument made it clear that it was the release-Society which supplied the releasor with necessary consideration from the subscriptions secured by the Society for the purpose of getting the properties in issue from time to time. Two of the properties covered by the instrument were the subject-matter of a gift deed dated 24th July, 1967 by one Jayachandra in favour of the Christian Assembly, Nagercoil, represented among others by Mr. Daniel and Brother Bhagat Singh. The second instrument was a sale deed executed in favour of the same body of Trustees. In and by the recitals, it was made clear that by the two documents above, the properties were acquired by the Christian Assembly or by the promoters for the benefit of the Society to be formed in order to ultimately benefit the Church which the Society had to hold. The instrument also recited that the Society which was the releasee was always understood as the accredited beneficial owner of the properties and that the Society requested Mr. Daniel who was representing it to relinquish his interest and title, if any, over the properties; and the deed of release under consideration was the resultant of the mutual understanding as between the parties. The Revenue doubted in view of the recitals therein and on a reference to the earlier documents which were the subject-matter of the treatment in the release deed under consideration whether the instrument in question should be treated as a bare 'release deed' or 'a conveyance' by Mr. Daniel in favour of the Society which was later registered in a manner known to law.

Held: It is by now well established that in order to interpret a document which is neither ambiguous nor incomplete the recitals in the said document ought to be generally the safe and sole guide for such interpretation. Any reliance *aliunde* on instruments other than the instruments under consideration might lead to queries which are beyond the scope of an answer to the question posed by the Revenue in a reference made to Civil Court under section 58 of the Stamp Act. Where there are recitals which are clinching and telling, in the sense, that there are assertions in it to the effect that the consideration for the purchase of the properties was made by the Society which is the releasee under the instrument and that the gift was made earlier because of a voluntary effort on the part of the donor under that gift to the inchoate assembly which had no legal status by then and which was functioning under the name and style of Christian Assembly, then it would be hazardous to invoke instruments other than the instrument in question for the purpose of interpretation. That this is one of the accepted methods of interpretation has been held in a Full Bench decision in *The Chief Controlling Revenue*

Authority v. *Dr. K. Manjunatha Rai,* (1976) 2 M. L. J. 279: A. I. R. 1977 Mad. 10. But this rule does not mean that the revenue is empowered to go behind recitals and terms of the document before it and hold that the object of the transaction was something different from what the document discloses and therefore the document should be deemed to be that which it is not. It cannot be held that the earlier deeds which were the basis for the acquisition of the properties dealt with under the instrument and the recitals therein could also be looked into for the purpose of understanding the true nature and contents of the document, dated 30th June, 1973 executed by Mr. Daniel in favour of the Society of Trustees of indigenous Churches in India.

Viewed also from another angle, an instrument whereby a benamidar sustains and declares the interest of the real owner and puts such intention in writing and styles it as a release deed, could only be interpreted and understood as a release deed pure and simple and it cannot be a conveyance as it is propularly understood.

The decision reported in *The Chief Controlling Revenue Authority* v. *M. Hamid Sultan,* (1975) 88 L.W. 27: (1975) 2 M.L.J. 36: A.I.R. 1975 Mad. 161 (F.B.) lays stress upon the well known proposition and observes that if in a given case it is proved that a transaction is a benami transaction and it satisfied the well known tests which revolve round such transaction, it is a document whereby the benamidar concedes and accedes to the title of the real owner and it could attract duty only as a release deed and not as a conveyance.

Held, further, that taking the recitals as a whole and accepting them as the sole guide for interpreting it is clear that the instrument has been correctly stamped as a release deed and it need not be stamped as a conveyance as defined in section 2 (10) of the Indian Stamp Act.

Additional Government Pleader, for Petitioner.

P. Ramaswami, for Respondent.

R.S. *Answered against the Revenue.*

P. Govindan Nair, CJ. and *V. Ramaswami, J.*

K. Krishnan *v.* Munuswamy.

12th January, 1978.

C.R.P. No. 3648 of 1976.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) *as amended by Act (XXIII of* 1973), *section* 14 (1) (b)—*Applicability* — Bona fide *requirement of building for immediate demolition—Scope—Demolition to be total — Removal of roof would not amount to demolition.*

A landlord filed a petition for eviction of a tenant in respect of two small portions of a building measuring about 10' X 10' where the tenant was running a tea shop and a betel-nut shop on the ground that he required the building *bona fide* for immediate demolition and construction of a new building. The petition was dismissed by the Rent Controller. On appeal by the landlord the Appellate Authority allowed the appeal and ordered eviction of the tenant. The tenant filed a revision petition challenging the order of the Appellate Authority. The tenant produced a plan in the lower Court showing that the landlord wanted to remove the roof and substitute the same with a pucca Madras terrace. Nowhere it was stated, that the landlord wanted to demolish the building and erect a new building on the site.

Held on a consideration of the provisions of the Act and the dictionary meaning of the word "demolition", that what is contemplated is total demolition of the structure, and erection of a new building on the site and the removal of the roof alone would not amount to demolition of the building. The order of the Appellate Authority was set aside and the eviction petition was dismissed.

(1965) 1 M.L.J. 78 and (1966) 1 M. L.J. 342 not followed.

K. P. Unnikrishnan and *N. V. Subramaniam,* for Petitioner.

P. S. Chinnappa, for Respondent.

R.S. *Petition allowed.*

Ismail, J.

A. Rajamani *v.* **M/s. Shriram Chits and Investments (P.) Ltd.**

2nd November, 1977.

C.R.P. No. 2023 of 1977.

Civil Procedure Code (Amendment) Act (CIV of 1976), sections 23, 60 and 97 (2) (g)—Attachment effected before the Amending Act — Petition to raise the attachment, on ground of salary liable to attachment being raised to Rs. 400 by the Amending Act — Amendment not effecting attachment already effected.

An order of attachment was effected prior to the coming into force of the Civil Procedure Code (Amendment) Act, CVI of 1976. The petitioner filed an application under section 151 of the Code of Civil Procedure praying to raise the order of attachment of his salary on the ground, that by virtue of the amendment effected to section 60 (1), the limit of the salary liable to attachment was raised to Rs. 400. The Court rejected the petition holding that the amendment did not affect the attachment already effected. The counsel for the petitioner contended that the attachment itself consisted of two parts, (1) the order of attachment passed by the Court and (2) the actual order of attachment with reference to the salary as and when the salary becomes payable. The contention was rejected for the simple reason that section 60 contemplates only an order of attachment to be passed by the Court and it did not have anything to do with any other subsequent or recurring order of attachment in respect of the salary payable for each month. In fact, there is a saving provision, section 97 (2) (*g*) in Act CIV of 1976 in the following terms:

"The provisions of section 60 of the Principal Act, as amended by section 23 of this Act, shall not apply to any attachment made before the commencement of the said section 23."

The expression "any attachment made before the commencement of the said section 23" occurring in this provision will take in only the order passed by the Court and nothing else. Consequently the earlier order passed by the Court attaching the salary remains unaffected by the amendment. Under these circumstances, the civil revision petition is liable to be dismissed.

S. G. Sambandam, for Petitioner.

N. Venkataraman, for Respondent.

S.J. *Petition dismissed.*

V. Balasubrahmanyan, J.

Bhagyalakshmi Ammal *v.* **Somalinga R. Kesavaiyer, Surviving Trustee, Thiruppirankundram Karthikai Somavaram Annadhana Samaradhanai Dharmam.**

9th January, 1978.

S.A. No. 1859 of 1974.

Trust—Dedication of properties for conducting charity—Revocation — Validity —Subsequent conduct of settlor in not giving effect to it not rendering the trust nugatory.

One 'S' founded a public charitable trust and dedicated certain properties to the said trust by a deed of settlement, dated 5th April, 1938. The charity was to be conducted from and out of the income of the trust properties. He nominated two other persons as co-trustees. The trust was being conducted every year as contemplated in the deed of settlement. Under the deed there was no power given to the trustee to alienate the property endowed for the trust. The trustee was not given any power to revoke the document. The object of the trust was to conduct *annadhana samaradhanai.* 'S', the founder of the trust executed a deed of cancellation in 1957, cancelling the deed of settlement of the year 1938, and continued to enjoy the suit property as his separate property till his death. The said 'S' died on 18th December, 1968. His widow sold the trust properties by means of a registered deed dated 6th April, 1970. The surviving trustee filed a suit for declaration that the suit property was trust property and for recovery of possession of the

same. The widow of 'S' who was the first defendant in the suit resisted the same, contending that the charity was never performed and the settlement executed by 'S' on 5th March, 1938, was never intended to be given effect to and it was a sham and nominal one and it was executed to protect the property from the clutches of the creditors. It was further alleged that the said 'S' treated the property as his property and othied the same in 1958 in favour a third party. The first Court dismissed the suit and, on appeal by the trustee, the appeal was allowed. The widow of 'S' filed a Second Appeal.

Held, that if there had been a valid dedication, the subsequent conduct of the settlor will not render it nugatory. At the time of the settlement all that was necessary to give effect to the settlement had been done. If the terms of the settlement were not carried into effect, it will make the settlor liable for breach of trust. It will not destroy the once validly created settlement.

(1914) 27 M.L.J. 582: 25 I.C. 428: 1914 M.W.N. 703 and (1973) 91 I.T.R. 261, followed.

Manicka K. Ramalingam, for Appellant.

R. Srinivasan, amicus curiae, for Respondent.

R.S. *Second appeal dismissed.*

S. Padmanabhan, J.

Sethuraman *v.* Muthiah.

2nd March, 1978.

A.S. No. 571 of 1975.

Partnership—Four persons carrying on business in partnership — Dissolution of partnership by consent of partners—Accounts settled—Mistake regarding a particular item of account—Suit by one partner against others—Prayer for recovery of a definite sum of money—Suit maintainable—Entire accounts need not be reopened—Surcharging and falsification allowed—Settled accounts liable to be reopened on mutual mistake—Doctrine of unjust enrichment also applicable.

A partnership was entered into to deal in pumpsets, motors, engines etc. The firm was run under the name and style of "M|s. Saravana Traders". The Mayavaram Co-operative Land Development Bank Ltd., placed orders with the said firm, for the supply of pumpsets of the value of Rs. 24,063.36 and the arrangement was that the firm must supply pumpsets to the parties named by the bank and on delivery of the pumpsets, the bank will pay the price to the firm. In pursuance of this agreement the pumpsets were sent by the firm to their Agent for the purpose of being supplied to the various parties named by the bank and an amount of Rs. 24,063.36 was debited to the bank account with the firm and shown as liability of the bank and asset of the firm. Subsequently, the firm was dissolved by mutual consent among all partners. The first respondent herein was given full right and liberty in his own name to collect all the assets of the erstwhile firm. He also agreed to pay the other parties, the amounts mentioned in the deed of dissolution of partnership in full and final satisfaction of the respective claims. The said amounts were paid to the other partners under the belief that he would be getting the amount from the bank. They did not suspect that their Agent would play a fraud upon them, by delivering the pumpsets not through the bank to the customers, but by supplying to persons not named by the bank. The bank repudiated its liability stating that the pumpsets were not supplied by the firm to parties specified by them and therefore they could not be held liable. When one partner paid the amounts to the others, they were under the *bona fide* belief that the amount will be recovered from the bank. Both were labouring under a common mistake as to their rights and obligations. A suit was filed by the respondent herein for the recovery of the amount paid by him to the other partners on the ground of mutual mistake.

Held, that the suit could be filed on grounds of mutual mistake regarding a particular item of accounts and settled accounts could be reopened, and surcharging and falsification would also be allowed. The theory of unjust enrichment was also applied and the appeal was dismissed confirming the judgment of the Trial Court.

N. C. Raghavachari, for *N. S. Varadachari* and *T. V. Ramanujam,* for Appellants.

K. Parasaran, for *R. Srinivasan,* for 1st Respondent.

M. Velusamy and *D. Anandhan,* for 2nd Respondent.

R.S. ——— *Appeal dismissed.*

Ismail, J.

A. Mohan Rao *v.* Krishnan.

9th February, 1978.

C.R.P. No. 652 of 1977.

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 14 (1) (b)*—Landlord seeking eviction of tenant—Ground of demolition and reconstruction — Motive therefor irrelevant.*

A landlord filed a petition for eviction of the tenant on the ground that he required the premises for the immediate purpose of demolition and reconstruction. The petition was dismissed by the Rent Controller. An appeal by the landlord was allowed by the Appellate Authority.

The tenant filed a revision petition against the order of the Appellate Authority.

It was contended on behalf of the tenant that the landlord purchased the buildings, bearing Door Nos. 63, 64 and 65 together and that the three buildings were constructed on the same day and that the landlord wanted to demolish only Door No. 63, alleging that it was in a bad condition and that there was no *bona fide* in the petition for eviction.

Held, that the Court is not concerned with the motive of the landlord for demolishing and reconstructing a building and that the Court can only take into account and consider whether the requirement of the landlord to demolish the buildings and reconstruct the same is *bona fide* in the sense that the landlord has a real intention to demolish and reconstruct the building and the motive for the said act is totally irrelevant. It was further held that even assuming that the landlord has thought of the method of demolition and reconstruction only to get rid of the petitioner, it cannot be held that the landlord does not require the building *bona fide* for the immediate purpose of demolition and reconstruction so long as the intention for such an action is true and real.

S. Palaniswamy, for Petitioner.

K. M. Santhanagopalan, for Respondent.

R.S. —— *Petition dismissed.*

Nainar Sundaram, J.

Meenakshi Aachi *v.* V. K. Kumaraswamy Chettiar.

28th February, 1978.

C.R.P. No. 1354 of 1975.

Evidence Act (I of 1872), *section* 45—*Suit on a promissory-note — Endorsement showing payment — Genuineness of endorsement disputed — Application for sending the promissory-note to Government expert—Proper procedure to be followed.*

It has been held that it is unsafe to part with documents in the course of the trial for inspection by a Finger Print expert. The Courts did not make any distinction between private and Government experts. The reason in not allowing the document to be handled by any person is only for the purpose of ensuring the safety of the document or prevent its being tampered with. As far as the Government expert is concerned unless it is not possible for the expert to examine the genuineness or otherwise of the endorsements without taking it from the custody of the Court, it would not be desirable to allow the document to be handled by him outside the Court. In these circumstances, it is proper and desirable to have the endorsement examined by the Government expert who will do it in the presence of a Court official. If he finds it necessary, he may be permitted to take photographic copies of the document.

Narasimhan v. *Narayanan Chettiar,* (1968) 2 M. L. J. 48; *Ramaswamy Konar* v. *Karuppa Konar,* (1971) 84 L. W. 348; *Doraiswamy Gounder* v. *Parayammal,* (1976) 1 M.L.J. 11: A.I.R. 1976 Mad. 66, followed.

K. Chandramouli, for Petitioner.

S. Kothandarama Nainar, for Respondent.

R.S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

C. Vasantha .. *Appellant**

v.

S. C. Pandian .. *Respondent.*

Civil Procedure Code (V of 1908), Order 20, rule 12—Discretion of Court to grant future profits when asked for by the plaintiff at any time before the termination of the lis—*Termination of the* lis *when takes place.*

It has by now become axiomatic, so to say, that, notwithstanding the absence of a prayer for the grant of future mesne profits, the Court has yet the discretion to grant the same under Order 20, rule 12, of the Civil Procedure Code when it is asked for by the plaintiff decree-holder before the termination of the *lis*. The discretion to grant such a prayer for future profits is only circumscribed and limited to the extent indicated above. That is, even if the plaintiff by a mistake or by an inadvertent omission, fails to make prayer for future mesne profits the Courts are not powerless as to granting the equitable relief for future mesne profits having regard to the circumstances of each case. This is how the discretion that is vested in Courts has been interpreted and understood.

[*Para.* 4.]

The accepted rule is that if a *lis* has to be given the badge of finality then it should be for all purposes known to law. In particular, when a suit has been brought into the portals of a Court by a litigant then the usual manner to treat that litigation as having terminated is with reference to the stage when it has culminated in a final decree. The finality attached to such a decree should for all legal purposes be unassailable. But, if that decree which is an *ex parte* decree is again brought into the hotchpot of litigation for challenge as being incorrect, then it obviously follows that the *lis* which originated by the plaintiff bringing it into Court has not yet terminated.

[*Para.* 5.]

Held, that it was not correct that the suit in the instant case had already terminated when the application for an enquiry into future mesne profits was filed. [*Para.* 6.]

Case referred to:—

Gopalakrishna Pillai v. *Meenakshi Ayal,* (1967) 1 An.W.R. (S.C.) 89: (1967) 1 M.L.J. (S.C.) 89: (1967) 1 S.C.J. 450: A.I.R. 1967 S.C. 155.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Sethuraman dated the 10th April, 1974 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application No. 776 of 1973 in C.S. No. 70 of 1968.

M. R. Narayanaswami and *M. S. Venkatarama Iyer,* for Appellant.

G. Natarajan, for Respondent.

The Order of the Court was delivered by

Ramaprasada Rao, J.—This appeal is against the order of Sethuraman, J., dated 10th April, 1974. The appellant, as plaintiff in C.S. No. 70 of 1968, filed

*O.S.A.No. 87 of 1974. *26th July,* 1977.

an application under Order 20, rule 12, Civil Procedure Code and sought for an enquiry into the mesne profits of the suit property admittedly in the possession of the respondent, from the date of occupation till the date of delivery of possession.

2. Certain relevant facts which led to the application may be noticed. Initially there was a controversy as to whether the plaintiff was entitled to the suit property. The plaintiff based her title on the will of one Solachi dated 4th December, 1961. This was resisted by Solachi's husband who set up another will dated 16th January, 1962 of his own wife. A contest therefore ensued between the plaintiff and her sister as legatees under the will of Solachi dated 4th December, 1961 as propounded by them and the claim of Ramiah based on the will dated 16th January, 1962 again said to be the will of the same Solachi. On a full enquiry this Court in T.O.S. No. 10 of 1963 granted Letters of Administration with the Will annexed, to the plaintiff by its order dated 27th September, 1965. In the course of the testamentary proceedings as above, earlier, the husband of Solachi is said to have leased out the property to the defendant for a period of five years. After being successful in the grant of the Letters of Administration in her favour, the plaintiff instituted the present action (C.S. No. 70 of 1968 on the file of this Court), for recovery of possession of the suit property and for mesne profits at the rate of Rs. 1,100 per mensem from 15th August, 1964, the date when the defendant was inducted into the property by Ramiah and for other reliefs. On 18th February, 1972 an *ex parte* decree was passed since the counsel appearing for the defendant reported 'no instructions'. On 17th March, 1972 the defendant filed an Application No. 812 of 1972 for setting aside the *ex parte* decree, and sought for stay of execution of the decree till then. During the pendency of this application to set aside the *ex parte* decree, the plaintiff (decree-holder), pursuant to her rights, filed an application for an enquiry into the future mesne profits *i.e.*, for the period subsequent to the original suit till the date of delivery of possession. It is common ground that this application under Order 20, rule 12, Code of Civil Procedure was filed at a time when the application to set aside the *ex parte* decree was pending. Thereafter, the Court which enquired into the application to set aside the *ex parte* decree passed certain orders from time to time granting some more time to the defendant to deliver vacant possession, but at the same time, making sure that the plaintiff was paid and compensated for such occupancy by the defendant during the period when he obtained a relief regarding his continuance in the property. The first order which is referable and the gist of which ought to be excerpted so as to understand fully the scope of the contentions between the parties is as follows:—

> "The application to set aside the decree is allowed on the above condition, namely that the applicant would deliver possession of the premises in accordance with the directions aforesaid to the decree-holder on or before 1st November, 1972 failing which the application shall stand dismissed. On the applicant satisfying the above condition, this application (Application No. 812 of 1972) to set aside the *ex parte* decree would stand allowed and the suit would stand dismissed as settled out of Court".

A further application for extension of time was filed before the same learned Judge and he had further extended the time in Application No. 2481 of 1972. The last of such extension was upto 21st February, 1973. Again, we make it clear that the learned Judge made a provision for the payment of damages for use and occupation of the property by the defendant upto 21st February, 1973. Finally, the defendant, again without complying with the orders of the Court made earlier regarding delivery of possession sought for an extension of time to do so, in Application No. 464 of 1973, which was dismissed by Paul, J., on 22nd February, 1973.

3. The above narration became necessary because it would be useful to refer to them in the course of our judg-

ment while setting out and meeting the arguments of counsel.

4. The plaintiff, not having secured possession of the property, filed Execution Petition No. 10 of 1973 and obtained possession of the property on 31st March, 1975. In the meantime, however, Application No. 776 of 1973, from which the present appeal arises, regarding the direction to enquire into the mesne profits in respect of the suit property for the period of occupation from the date of the suit till the date of delivery of possession was not disposed of. It came up for final orders only in April, 1974 before Sethuraman, J. The learned Judge was of the view that as the suit had terminated, an application under Order 20, rule 12, Civil Procedure Code was not maintainable and he dismissed the application and directed the appellant-plaintiff to an independent suit to recover such future mesne profits. The learned Judge, however, made one position clear and we are reiterating it here so that it may not be necessary for us to readvert to it again. While considering the scope and content of the prayer in the petition the learned Judge expressed the view that the prayer of the plaintiff would take in future mesne profits also. But, ultimately, however, he dismissed the application on the ground already stated. The appeal is against the said order. It has by now become axiomatic so to say, that, notwithstanding the absence of a prayer for the grant of future mesne profits, the Court has yet the discretion to grant the same under Order 20, rule 12 of the Code when it is asked for by the plaintiff-decree-holder at any time before the termination of the *lis*. The discretion to grant such a prayer for future mesne profits is only circumscribed and limited to the extent above indicated. That is, even if the plaintiff, by a mistake or by an inadvertent omission, fails to make prayer for future mesne profits the Courts are not powerless as to granting the equitable relief for future mesne profits having regard to the circumstances of each case. This is how the discretion that is vested in Courts has been interpreted and understood. *Gopalakrishna Pillai* v. *Meenakshi Ayal*[1], made this position clear in the following terms:—

> "Under Order 20, rule 12 of the Civil Procedure Code enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for enforcement of the two claims. With regard to past mesne profits the plaintiff has an existing cause of action on the date of institution of the suit. In view of Order 7, rules 1, 2 and 7 of the Civil Procedure Code, and section 7 (1) of the Court-fees Act, a plaintiff must plead his cause of action, specifically claim a decree for past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the date of institution of the suit and it is not possible for him to plead this cause of action or to value it, or to pay court-fees thereon at the time of institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of Order 20, rule 12, apply. But, in a suit to which the provisions of Order 20, rule 12 apply, the Court has discretionary power to pass a decree directing an enquiry into future mesne profits and the Court may grant a general relief though it is not specifically asked for in the plaint".

In the instant case, it is not even necessary for us to traverse the content of the discretionary power vested in a Court in the circumstances above stated. This is because Sethuraman, J., himself finds that the prayer in the plaint would take in the prayer for future mesne profits also. This would mean that by necessary implication the plaintiff who did not ask for it in the first instance and caused it to be introduced at a later stage by an amendment of the plaint, should be deemed to have asked for the future mesne profits. Therefore, the principle that the Court has discretion to

1. (1967) 1 An.W.R. (S.C.) 89: (1967) 1 M.L.J. (S.C.) 89: (1967) 1 S.C.J. 450: A.I.R. 1967 S.C. 155.

grant such mesne profits even when it is not specifically prayed for, does not strictly arise for consideration in the instant case.

5. The other question which arises for consideration is whether the *lis* did terminate on the date when the application under Order 20, rule 12, Civil Procedure Code was filed or whether it was pending. Here again the accepted rule is that if a *lis* has to be given the badge of finality then it should be for all purposes known to law. In particular, when a suit has been brought into the portals of a Court by a litigant, then the usual manner to treat that litigation as having terminated is with reference to the stage when it has culminated in a final decree. The finality attached to such a decree should, for all legal purposes, be unassailable. But, if that decree which is an *ex parte* decree is again brought into the *hotch-pot* of litigation for being challenged as being incorrect, then it obviously follows that the *lis* which originated by the plaintiff bringing it into the Court has not yet terminated. We have already, while setting out the facts, referred to one important event, *viz.*, that this application for the enquiry into the future mesne profits under Order 20, rule 12, Civil Procedure Code was filed on 7th April, 1972 when the application to set aside the *ex parte* decree was pending by then. The application by the defendant to set aside the *ex parte* decree passed on 18th February, 1972 was filed on 17th March, 1972. During the pendency of the enquiry into the possibility or feasibility of setting aside the *ex parte* decree, the present application under Order 20, rule 12, Civil Procedure Code was made. It cannot, therefore, be said, in the instant case, that the application requesting for an enquiry into the future mesne profits was made at a time when the *lis* had terminated or ended in a manner known to law. The argument of Mr. Damodara Rao, however, is that the *ex parte* decree should be deemed to have stood the test of time notwithstanding the supervening orders passed by the Court in the various applications taken out by the respondent for extension of time for delivery of possession and notwithstanding a modification in the text of the *ex parte* decree made earlier. He would refer to the fact that this Court, while dealing with Application No. 812 of 1972 and similar applications filed by the defendant thereafter, would sustain the *ex parte* decree if the defendant did not conform to the conditions laid down in these respective orders. But, with respect to Mr. Damodara Rao, we are unable to agree for the reason that even the learned Judge, who gave certain indulgences from time to time to the defendant, was conscious of the fact that it was only on the defendant's satisfying the conditions laid down in those respective orders the application to set aside the *ex parte* decree would stand allowed and the suit would stand dismissed as having been settled out of Court. This observation obviously means that there is a modification or a fresh look into the decree which was couched in the *ex parte* decree and therefore, there was a fresh executable order which was facing the plaintiff every time when the defendant obtained an indulgence or a concession from Court in the matter of re-delivery of the property. In this view of the matter, it cannot be said that the *ex parte* decree passed on 18th February, 1972 stood at all times as an unchallenged one, but on the other hand, this was revised, modified and, to a certain extent, substituted by a later order of Court which is certainly an executable order or decree. We say that later orders passed in applications such as Application No. 812 of 1972 are executable orders because the decree-holder cannot disobey the direction therein and seek for execution of the *ex parte* decree ignoring the force contained and the directions issued by this Court in the subsequent orders in Application such as Application No. 812 of 1972 etc. We are therefore of the view that till the final order was passed by Paul, J., in February, 1973, the *lis* was pending. It therefore follows that Application No. 776 of 1973 filed on 7th April, 1972, and which was not disposed of on the date when Paul, J., finally refused to grant any indulgence to the defendant was still pending and that there was no termination of the litiga-

tion as can be popularly and legally understood.

6. The learned Judge was, therefore with respect, not correct when he said that the suit has already terminated when the application for an enquiry into the future mesne profits was filed. The order of the learned Judge, therefore, is set aside and this Original Side Appeal is allowed. There will be no order as to costs. The matter shall be placed again before the learned Judge sitting on the Original Side, for him to pass orders for appropriate steps being taken for an enquiry, under Order 20, rule 12, Civil Procedure Code as prayed for in the Judge's summons.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

V. Thiagarajan .. *Petitioner**

v.

Mohammed Umar Sait and another .. *Respondents.*

Evidence Act (I of 1872), section 44—Suit on promissory note—Leave to defend granted on condition of deposit—Condition not fulfilled in time—Decree passed in the presence of defendant—Deposit made within time granted by High Court on revision—Application under Order 37, rule 4 Civil Procedure Code to set aside decree dismissed on 24th September, 1974—Application under section 44 of the Evidence Act filed on 26th September, 1974 on the ground that the decree was obtained by fraud—Decree set aside—Revision allowed—Lower Court's jurisdiction lost once the decree became final on dismissal of the application under Order 37, rule 4, Civil Procedure Code.

A suit was filed on a promissory note for Rs. 10,000 executed by the respondents. Leave to defend was granted on condition that on or before 29th February, 1972 the respondents should deposit Rs. 6,000. The deposit was not made. The suit was called on 1st March, 1972 and in the presence of the respondents, it was decreed. In the meanwhile, the respondents had filed a revision against grant of conditional leave before the High Court which was dismissed *in limine*, but time was granted and the deposit was made on 6th March, 1972. However, the decree passed on 1st March, 1972 was made before this was communicated to the lower Court. On 31st July, 1974, the respondents filed an application under Order 37, rule 4, Civil Procedure Code to set aside the decree and this was dismissed on 24th September, 1974. On 26th September, 1974, I.A. No. 22623 of 1974 was filed under section 44 of the Evidence Act alleging that the decree was obtained by fraud, since on inspection it was found that the promissory note was not sufficiently stamped originally and later on another stamp was affixed thereon and crossed. The lower Court accepted this application and set aside the decree passed on 1st March, 1972 and directed the suit to be posted. Against this, the plaintiff filed a revision.

Held: The application under Order 37, rule 4, Civil Procedure Code was dismissed on 24th September, 1974. That order not having been appealed against or questioned it had given finality to the decree dated 1st March, 1972. Therefore, the Court would have absolutely no jurisdiction to set aside the decree in any manner. [*Para.* 6.]

Section 44 of the Evidence Act relates to procedure. It did not confer any right on a party. Therefore, the respondents herein were not entitled to move the Court under section 44 of the Evidence Act. A mere reading of that section would clearly show that if a judgment was sought to be relied upon in a proceeding, it was well open to the party to contend that the judgment sought to be relied on was obtained by fraud. That is far from saying that a Court had jurisdiction to set aside a decree under this section at the instance of one of the parties saying it was obtained by fraud. [*Para.* 6.]

* C.R.P. No. 1323 of 1975. *28th April, 1977.*

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court (VI Assistant Judge), Madras, dated 25th March, 1975 and made in I. A. No. 22623 of 1974 in O.S. No. 7311 of 1970.

K. Hariharan, for Petitioner.

M. N. Krishnamani, for Respondents.

The Court made the following

ORDER:—On 14th November, 1969, the respondent in the revision petition executed a promissory note in favour of the revision petitioner herein for a sum of Rs. 10,000. On the foot of that promissory note, O.S. No. 7311 of 1970, came to be filed under Order 37, Civil Procedure Code on 23rd December, 1970. The respondents herein filed I.A. No. 9065 of 1971 seeking leave to defend. It was his case that no consideration had passed. The Court by an order dated 11th February, 1972 granted conditional leave directing the respondent to deposit a sum of Rs. 6,000 on or before 29th February, 1972 failing which the said petition would stand dismissed and the suit was directed to be called on 1st March, 1972. The deposit was not made in accordance with this order. Therefore, the suit was taken up on 1st March, 1972. At that time, the counsel for the respondent was stated to be present and it was decreed. In the meanwhile what had happened is against the grant of conditional leave in I.A. No. 9065 of 1971, the matter was taken up to this Court in C.R.P. No. 509 of 1972 and that was dismissed *in limine*. However, time was extended to deposit the sum of Rs. 6,000 by one week from 1st March, 1972. On 6th March, 1972, the deposit was made. It has to be presumed under these circumstances, that the decree dated 1st March, 1972 was passed without being aware of the order by this Court, which was communicated only on 2nd March, 1972. Having regard to these important facts, no objection could be taken to the decree as such. Nevertheless, on 31st July, 1974, I.A. No. 14962 of 1974 was filed by the respondent herein under Order 37, rule 4, Civil Procedure Code to set aside the decree. By an order dated 24th September, 1974 the said application was dismissed. On 26th September, 1974, I.A. No. 22623 of 1974 was filed, purporting to be under section 44 of the Evidence Act alleging that the decree in O.S. No. 7311 of 1970 passed on 1st March, 1972 came to be obtained by fraud, since on inspection of the said promissory note, the respondent came to know that the promissory note was originally insufficiently stamped and later on another stamp was affixed and it was crossed so as to make it a valid promissory note. The learned City Civil Judge, Madras passed an order setting aside that decree on payment of costs Rs. 50 on or before 10th April, 1975 and directed the suit to be called on 11th April, 1975. Aggrieved by this order, the present civil revision petition has come to be filed.

2. Mr. M. R. Narayanaswamy, learned counsel for the petitioner contends as under:

3. Firstly, section 44 of the Evidence Act does not confer any substantive right on the parties. It is a matter relating to the procedure. Therefore, the application under revision itself is misconceived.

4. Secondly, assuming that the application is maintainable under section 44 of the Evidence Act, the Court which passed the order under revision was oblivious to the important fact that I. A. No. 14962 of 1974 was dismissed as early as 24th September, 1974. Thereby finality had been reached concerning the decree in O.S. No. 7311 of 1970 and thereafter, the Court has no jurisdiction to re-open the matter and lastly it is submitted that it is not correct on the part of the Court to hold that the decree dated 1st March, 1972 is an *ex parte* decree.

5. Mr. M. N. Krishnamani, learned counsel for the respondent would urge in meeting the contentions that the decree dated 1st March, 1972 was passed by the City Civil Court in ignorance of the order of this Court whereby the time was extended on 1st March 1972 by one week to deposit Rs. 6,000. In compliance of that order, a sum of

Rs. 6,000 had been deposited and, therefore, the decree itself cannot be said to be valid. Only on inspection of the suit promissory note, the affixture of the additional stamp came to be noticed and, therefore, the defendant (respondent herein) was well justified in invoking section 44 of the Evidence Act and no exception could be taken to the order under revision.

6. I must confess my inability to appreciate the order under revision, which only shows that the learned Judge, City Civil Court, had not even cared to look at the provisions of section 44 of the Evidence Act. Section 44 of the Evidence Act occurs under the heading "Judgments of Courts of Justice, when relevant". This provision relates to procedure. It does not confer any right on the party. Therefore, the respondent herein is not enabled to move the Court under section 44 of the Evidence Act. A mere reading of that section, which is in the following terms:

> "44. *Fraud or collusion in obtaining judgment or incompetency of Court, may be proved.*—Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

will clearly show that if a judgment is sought to be relied upon in a proceeding, it is well open to the party to contend that the judgment sought to be relied on, was obtained by fraud. This is far from saying that a Court has jurisdiction to set aside a decree under this section at the instance of one of the parties saying it was obtained under fraud. Though the order under revision in terms does not refer to section 44, the very application for the invoking the jurisdiction of the City Civil Court was under section 44. Therefore, it was necessary on the part of the learned Judge to have adverted to this section before entertaining the application. He had not cared to do so. Not only that; as if adding insult to injury no reference is made to the order in I.A. No. 14962 of 1974. He is completely oblivious to that proceeding which has got a material bearing on the issue, namely, I.A. No. 14962 of 1974. As the narration of the facts would disclose that was an application under Order 37, rule 4, Civil Procedure Code filed by the respondent herein to set aside the decree dated 1st March, 1972. That was dismissed on 24th September, 1974. That order, not having been appealed against or questioned had given finality to the decree dated 1st March, 1972. Thereafter, the City Civil Court will have absolutely no jurisdiction to set aside the decree in any manner. Notwithstanding this the present application was entertained and considering the same as an *ex parte* decree, an order was passed setting aside the decree on terms. I am only surprised about the casual manner in which the learned City Civil Judge has approached the matter, which is hardly commendable.

7. Therefore, the revision has to be allowed and it is hereby allowed with costs.

S.J. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. D. Koshal, J.*

Munia Reddiar .. *Petitioner**

v.

The Board of Revenue, represented by Commissioner of Land Revenue and Land Reforms, Chepauk, Madras-5 and another .. *Respondents.*

Arms Act (LIV of 1959), *sections* 17 *and* 18—*Petitioner, holder of a gun licence—Cancellation of licence for alleged involvement in a number of hurt cases—Details of offences and specific charges not furnished to petitioner—Principles of natural justice violated—Order cancelling licence liable to be quashed.*

Section 17 of the Arms Act does not State in so many words that the licenc-

* W.P. No. 2439 of 1972.

25th February, 1977.

ing authority has to give a reasonable opportunity to the concerned licencee of being heard before his licence is revoked, it does not however eliminate the application of the principles covered by the proviso to section 18 (5), which is a principle of natural justice. Besides, the grounds on which the licensing authority may revoke a licence are circumscribed by the provisions of clases (*a*) to (*c*) of section 17 (3). Sub-section (5) of that section enjoins on the licensing authority to record its reasons when it makes an order of revocation, and to furnish to the licensee on demand a brief statement of those reasons, unless it is not in the public interest to do so. Section 17, therefore postulates a quasi-judicial order in framing which, in the absence of a provision to the contrary, the licensing authority has to observe the rules of natural justice, including the one that no person shall be condemned unheard. This principle does not appear to have been followed either by the D.R.O. or by the Board of Revenue inasmuch as the petitioner was not supplied with the details of the case which he had to meet. Unless he was enabled to have his say in relation to the particular charges which were levelled against him, it cannot be said that he was given a reasonable opportunity of being heard. [*Para.* 4.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in BP.RT. No. 852 (L), dated 14th February, 1972 confirming the order of the 2nd respondent in NA.KA. No. 6128 of 1971 (64), dated 11th February, 1972 and quash the same.

R. Veeramani and *V. Santhanakrishnan,* for Petitioner.

The Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner is a land-owner in village Kamakkapalayam in Attur taluk of Salem district. On the 30th of June, 1970 his application for the grant of a licence for the possession of a gun was accepted by the District Revenue Officer, Salem (hereinafter referred to as the D.R.O.). The licence was renewed on the 22nd of December, 1970 for the period ending with the 31st of December, 1973.

2. A notice dated the 11th of February, 1971 was issued by the D.R.O. to the petitioner requiring him to show cause why his gun-licence should not be cancelled for the reason that he was involved in civil and criminal cases registered in Thalaivasal Police Station, that other cases were also pending and that he had been guilty of rowdy behaviour and had threatened others. The petitioner sent a reply to the notice stating *inter alia* that consequent upon an election dispute, he had been attacked by enemies and had sustained injuries, that he had made a complaint to the police to that effect and that another complaint was made against him by one Chinnaswamy on the 29th of November, 1970, which, however was "referred to by the police as a mistake of fact". He denied that he mis-used the gun to possess which he had a licence and prayed that the show-cause notice be withdrawn.

3. By an order dated 22nd November, 1971, the D.R.O. cancelled the petitioner's gun-licence and that order was upheld in appeal by the Board of Revenue through its order, dated the 14th February, 1972. Both these orders are challenged by the petitioner under Article 226 of the Constitution of India with a prayer that they be quashed by a writ of *certiorari*.

4. The reasons for the cancellation of the petitioner's gun-licence are thus listed by the Board of Revenue in paragraph 4 of its order above mentioned:

"The Board finds that the licence issued to the appellant was cancelled in a number of hurt cases. The police authorities have given specific instances in which he was party. A perusal of the connected files would show that the apprehension of the police authorities was *bona fide* and as the appellant

was involved in local fights, it would be unwise to permit him to hold a licence any more. The Board does not see any reason why this view of the police authorities should not be accepted."

Although the petitioner has remained absent and unrepresented at the hearing, I have gone through the petition and find that at no stage the details of the material used by the D.R.O. and the Board of Revenue against him were supplied to him, nor does it appear that such material necessarily justified cancellation of the gun-licence held by the petitioner. The fact that the petitioner was involved in a number of hurt cases appears to be true. But there is absolutely nothing on record to show as to whether he was the aggressor or the victim therein. The "specific instances" and the "local fights" referred to by the Board suffer from the same infirmity. It may well be that the petitioner was the aggressor in the instances referred to by the Board. But it may also be that he was really a victim of aggression at the hands of others in most or some of the instances. Before the said instances could be used against the petitioner for the cancellation of his gun-licence, it was incumbent on the authorities to furnish the petitioner with details of those instances and also the specific charges which he was required to meet. This follows from the provisions of sections 17 and 18 of the Arms Act, 1959 (Central Act LIV of 1959). Sub-sections (3) and (5) of section 17 provide:

"17 (3). The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence,

(*a*) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(*b*) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(*c*) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(*d*) if any of the conditions of the licence has been contravened; or

(*e*) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver up the licence".

"(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of opinion that it will not be in the public interest to furnish such statement."

Sub-section (5) of section 18 lays down:

"In disposing of an appeal the appellate authority shall follow such procedure as may be prescribed:

Provided that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard."

Although section 17 does not state in so many words that the licensing authority has to give a reasonable opportunity to the concerned licensee of being heard before his licence is revoked, it does not eliminate the application of the principle covered by the proviso to sub-section (5) of section 18 which merely embodies a principle of natural justice. Besides, the grounds on which the licensing authority may revoke a licence are circumscribed by the provisions of clauses (*a*) to (*e*) of sub-section (3) of section 17, and sub-section (5) of that section enjoins on the licensing authority to record its reasons when it makes an order of revocation, and to furnish to the licensee on demand a brief statement of those reasons, unless it is not in the public

interest to do so. Section 17 therefore postulates a quasi-judicial order in framing which, in the absence of a provision to the contrary, the licensing authority has to observe the rules of natural justice including the one that no person shall be condemned unheard. This principle does not appear to have been observed either by the D.R.O. or by the Board of Revenue inasmuch as the petitioner was not supplied with the details of the case which he had to meet. Unless he was enabled to have his say in relation to the particular charges which were levelled against him, it cannot be said that he was given a reasonable opportunity of being heard.

5. Here I may make it clear that although the period for which the petitioner held the gun-licence has long expired. I have decided the petition on merits for the reason that if the impugned orders are found to be illegal, and are not struck down, they would stand in the way of the petitioner getting a licence practically for all time to come and thus perpetuate an injustice.

6. In the result, the petition succeeds and is accepted and the impugned orders are quashed. It will, however, be open to the authorities empowered to cancel arms licences under the Arms Act to re-open the question of cancellation of the petitioner's licence after giving him a proper opportunity of being heard in the light of the observations made above and in accordance with law. There will be no order as to costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

V. Usman Koya .. *Petitioner**

v.

R. Muthukrishnan and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 9 (2)—Death of landlord—Tenant petitioner in doubt as to whom he should pay the rent—Petition under section 9 (2) of the Act and deposit of rent in Court of Rent Controller—Agreement between the claimants to share the deposit—Consequent petition by tenant—Tenant filing an interlocutory application and withdrawing amount deposited without notice to the heirs of the landlord—Interlocutory application under section 151, Civil Procedure Code to direct tenant to re-deposit amount—Re-deposit ordered by Rent Controller and confirmed by appellate authority—Revision to High Court.

Held: There is no provision in the Tamil Nadu Buildings (Lease and Rent Control) Act enabling a tenant who had deposited in Court the amount towards rent admittedly due from him in view of his doubt as to the person entitled to receive the payment, to withdraw the amount. The amount represented the rent due to the persons having interest in the demised premises. The Rent Controller, therefore committed, a mistake in allowing payment out of the amount to the petitioner. The Rent Controller, as a quasi-judicial tribunal, has power to rectify the mistake by directing the petitioner to re-deposit the amount. [*Para.* 3.]

Cases referred to:—

Seethalakshmi Ammal v. *Rajammal*, (1965) 1 M.L.J. 287; *Ganapathi* v. *Kumaraswami*, (1975) 2 M.L.J. 171: 88 L.W. 525: A.I.R. 1975 Mad. 383;

* C.R.P. No. 1894 of 1976.

15*th April*, 1977.

S. N. Komaraswami Goundan, In re, (1951) 1 M.L.J. 422: 64 L.W. 730: A.I.R. 1951 Mad. 766.

Petition under section 25 of Tamil Nadu Act (XVIII of 1960) (as amended by Act XXIII of 1973) praying the High Court to revise the Order of the Court of the Subordinate Judge, Coimbatore dated 29th June, 1976 and made in R.C.A. No. 180 of 1975 (I.A. No. 26 of 1975 in R.C.O.P. No. 296 of 1973 on the file of House Rent Controller (District Munsif) Coimbatore).

S. Nainarsundaram, V. Natarajan and *V. Nicholas,* for Petitioner.

T. R. Rajagopalan and *T. R. Rajaraman,* for Respondents.

The Court delivered the following

JUDGMENT:—The tenant who had lost before the Rent Controller as well as the Appellate Authority is the petitioner. This petition has been filed to revise the order of Appellate Authority confirming the order of the Rent Controller directing the petitioner to re-deposit a sum of Rs. 21,580-92P. which he had deposited towards rent due from him in R.C.O.P. No. 296 of 1973 which he had filed under section 9 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, and which he had subsequently withdrawn as per order in I.A. No. 204 of 1974. The petitioner had become a tenant of the premises under one Varadarajan who died on 7th August, 1971 leaving his widow Rukmaniammal (fourth respondent), three sons and one daughter as well as his mother Rajammal (second respondent) and two brothers Nagarajan (third respondent) and Muthukrishnan (first respondent). Since the petitioner was in doubt about the person to whom he should pay the rent subsequent to the death of Varadarajan who had leased the premises to him, he filed the aforesaid R.C.O.P. No. 296 of 1973 under section 9 (2) of the Act and deposited the sum of Rs. 21,580-92P. in the Court of the Rent Controller. The three branches appear to have agreed to share the amount in certain proportions, and consequently, R.C.O.P. No. 296 of 1973 was dismissed on 9th August, 1974. However, strangely enough, the petitioner withdrew the amount by filing I.A. No. 204 of 1974 for issue of a cheque for the said amount, evidently without notice to the respondents in the main R.C.O.P. The first respondent heein, Muthukrishnan, filed I. A. No. 155 of 1975 to excuse the delay in filing an appeal against the order I.A. No. 204 of 1974, but it was dismissed on the ground that the Limitation Act is not applicable to proceedings under the Rent Control Act. Later respondents 1 and 2 in the present petition, against whom alone the present petition is pressed by the learned counsel for the petitioner, filed I.A. No. 26 of 1975 on 18th February, 1975 under section 151 of the Code of Civil Procedure, for a direction to the petitioner herein to re-deposit the amount of Rs. 21,580-92P. The petitioner's defence was that section 151 of the Code of Civil Procedure cannot be invoked for directing him to re-deposit the above amount in proceedings under the Rent Control Act. The petitioner claimed to have paid a sum of Rs. 7,813-96P to the first respondent, a sum of Rs. 8,274-76P. to the third respondent and a sum of Rs. 8,774-76P. to the fourth respondent and he contended that in view of these payments he cannot be directed to re-deposit the amount in any event.

2. The Tribunals below rejected the contentions of the petitioner and directed him to re-deposit the amount. The Appellate Authority has observed in his order that the receipt of Rs. 7,813-96P. by the first respondent is not disputed. The payment of Rs. 8,274-76P. to the third respondent was not disputed before the Rent Controller. The Appellate Authority found the payment of Rs. 8.774-76P. to the fourth respondent to be true.

3. Deceased Varadarajan has left the second respondent as his heir and since there was admittedly dispute between the parties about the right to receive the rent, the petitioner himself was in doubt as to who was entitled to

receive the amount. The subsequent payment of the various amounts out of Court in the absence of any agreement between the parties to receive the payment in any proportion cannot avail the petitioner. The point strongly urged by the learned counsel for the petitioner is that the Rent Controller and the Appellate Authority are only *persona designata* and section 151 of the Code of Civil Procedure cannot be invoked before them for directing the petitioner to re-deposit the amount, albeit the amount was wrongly paid out to the petitioner. It is conceded there is no provision in the Act enabling a tenant who had deposited the amount under section 9 (2) of the Act to withdraw the amount. There can be no doubt that the money deposited in R.C.O.P. No. 296 of 1973 belonged to the respondents in that petition and other heirs of Varadarajan. The learned counsel for the petitioner relied on the decisions of Kailasam, J. (as he then was) in *Seethalakshmi Ammal* v. *Rajammal*[1], and of Gokulakrishnan, J. In *Ganapathi* v. *Kumaraswami*[2], in support of his contention that the Rent Controller and the Appellate Authority are *persona designata*. Kailasam, J., (as he then was) has, no doubt, held in the former decision that the Rent Controller is not a Court and the Code of Civil Procedure is not applicable and he has no power to appoint a commissioner to inspect the premises and make a report for fixing fair rent. Gokulakrishnan, J., has, after considering several decisions, held in the subsequent case that the Rent Controller constituted under the Tamil Nadu Act is only a *persona designata* and not a Court. The learned Judge was considering the question whether the provisions of the Limitation Act could be relied upon before the Appellate Authority for condoning a delay in filing an appeal against the order of eviction passed by the Rent Controller. These decisions do not apply to the facts of the present case. On the other hand, the learned counsel for the first and second respondents invited my attention to the decision of a Bench of this Court in *S. N. Komaraswami Goundan, In re*[1], and submitted that the Rent Controller has committed a mistake in ordering payment out of the amount in the cheque petition and he has jurisdiction to rectify his mistake by ordering the petitioner to re-deposit the amount, at the instance of the first respondent. The learned Judges have observed in that decision that it may be that section 151 of the Code of Civil Procedure, by itself, does not apply to proceedings under the Madras Buildings (Lease and Rent Control) Act, 1946, but quasi-judicial tribunals like the Rent Controller and the Appellate Tribunal have an inherent power to set right mistakes made by inadvertence. The learned Judges have made that observation in a case which arose out of an application for amendment of the petition. As already stated, there is no provision in the Act enabling a tenant who had deposited the amount towards rent admittedly due from him in view of the doubt which he had as to the person entitled to receive the payment, to withdraw the amount after the dismissal of the petition. The amount represented the rent due to the persons having interest in the demised premises. The Rent Controller, therefore, committed a mistake in allowing payment out of the amount to the petitioner in the cheque petition. Relying upon the Bench decision of this Court, I hold that the Rent Controller, as a quasi-judicial tribunal, has power to rectify the mistake by directing the petitioner to re-deposit the amount. There is, therefore, no reason to interfere with the order of the Tribunals below. The civil revision petition is dismissed with the costs of respondents 1 and 2.

R.S. —— *Revision dismissed.*

1. (1965) 1 M.L.J. 287.
2. (1975) 2 M.L.J. 171; 88 L.W. 525: A.I.R. 1975 Mad. 383.

1. (1951) 1 M.L.J. 422: 64 L.W. 730: A.I.R. 1951 Mad. 766.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

S. Y. Venkateswaralu, The Springs, Wellington Bazaar P.O., The Nilgiris District .. *Petitioner**

v.

The Director General of Ordnance Factories, 44, Park St., Calcutta-16, West Bengal and another .. *Respondents.*

Central Civil Services (Classification, Control and Appeal) Rules, 1965—Assistant Cashier — In-charge of Cumulative Time Deposit Scheme—Irregularities and shortages — Charges framed—Enquiry under rule 14—Request by petitioner to engage legal practitioner to defend him, at the enquiry — Refusal of request—Petitioner not taking part in the enquiry—Petitioner found guilty of the charges — Dismissal from service—Appeal by petitioner dismissed — Validity of the dismissal order and the Appellate order challenged — Reasonable opportunity held not given to petitioner to defend himself — Writ of certiorari *issued — Constitution of India* (1950), *Article* 226.

The petitioner was an Assistant Cashier in the Cordite Factory, Aruvankadu, Nilgiris. In April, 1963, the Cumulative Time Deposit Scheme was introduced and the petitioner was asked to look after the work relating to the scheme on 8th January, 1974. After the petitioner took over charge, certain irregularities and shortages of funds were noted. Charges were framed against the petitioner and a memo., dated 5th June, 1969 was served on the petitioner intimating that an enquiry would be held under rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965. The petitioner, by his letter, dated 20th June, 1969, requested the Department to permit him to engage a legal practitioner to defend him at the enquiry. This was refused on the ground that the presenting officer appointed by the Government was not a legal practitioner. However, the petitioner was intimated that he could have the assistance of another Government servant to defend him at the enquiry. The petitioner, however, did not appear before the enquiry officer and the enquiry was conducted *ex parte*. The enquiry officer found the petitioner guilty of all the charges and accordingly the petitioner was dismissed from service by an order, dated 30th August, 1972. Thereafter, the petitioner filed an appeal before the Director-General, Ordnance Factories, Calcutta and this was dismissed. The petitioner challenged the validity of the order of dismissal as well as the appellate order.

Held: Sub-rule 8 of rule 14 contemplated permission being given to the petitioner for the engagement of a legal practitioner on two grounds: (1) the presenting officer happened to be a legal practitioner; or (2) the circumstances of the case warranted such an appointment. The department in this case rejected the request of the petitioner only on the ground that the presenting officer was not a legal practitioner. But whether the circumstances of the case justified the engagement of a legal practitioner had not been considered at all. Therefore, it had to be taken that sub-rule 8 of rule 14 had not been followed in rejecting the petitioner's request for engaging a legal practitioner. [*Para.* 5.]

Following the decision of the Supreme Court (in *C. C. Subramanian* v. *The Collector of Customs, Cochin,* A.I.R. 1972 S. C. 2178), it was held that the petitioner did not have a reasonable opportunity to defend himself at the enquiry. Having regard to the serious nature of the charges framed against the petitioner, the Enquiry Officer would have been justified in permitting the petitioner to engage a legal practitioner. [*Para.* 5.]

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*W.P. No. 2127 of 1973. *13th June,* 1977.

Case referred to:—

C. L. Subramaniam v. *The Collector of Customs*, (1972) 3 S.C.R. 485: (1973) 2 S.C.J. 488: A.I.R. 1972 S.C. 2178.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondents herein, *viz*., No. 1981|A|VIG of the 1st Respondent, dated 30th December, 1972 and No. 430 MO, dated 30th August, 1972 of the 2nd respondent and quash the said orders, *viz*., No. 198|A|VIG, dated 30th December, 1972 and No. 430 MO, dated 30th August, 1972.

K. Thirumalai, for Petitioner.

T. Chengalvaroyan, Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER.—The petitioner herein was an Assistant Cashier in the Cordite Factory, Aruvankadu, Nilgiris. In April, 1963, the Cumulative Time Deposit Scheme was introduced in the Factory and one Radhakrishnan, an Assistant Cashier, was in charge of that scheme. The petitioner was asked to attend to the work relating to the scheme on 8th January, 1964 after relieving the said Radhakrishnan. After the petitioner took over the work relating to the said scheme, certain irregularities and shortages of funds had been noted. In relation to those shortages and irregularities charges have been framed against the petitioner as well as five others.

2. So far as the petitioner is concerned, the charge memo. was served on him setting out as many as six charges. The said charges related to defalcation by the petitioner of huge amounts while he was in charge of the said scheme. The charge memo. was served along with a memo., dated 5th June, 1969. In that memo., the petitioner was informed that it was proposed to hold an enquiry against the petitioner in relation to the charges under rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. As soon as the said memo. was served on the petitioner he, by his letter, dated 20th June, 1969, requested the Department to permit him to engage a legal practitioner to defend him. But, the Department, by its letter, dated 17th April, 1970, rejected that request in the following words:

> "With reference to your request for engaging a lawyer to assist you in the forthcoming Court of Enquiry to be held in connection with the charges levelled against you in the above quoted Memorandum, please note, that it is not permissible for you to engage a legal practitioner *vide*, sub-rule (8) of rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965 since the presenting officer appointed by the Government is not a legal practitioner".

Subsequently, the petitioner's Advocates, M|s. Devraj and Sridharan, addressed a letter, dated 23rd April, 1970 to the General Manager, Cordite Factory, Aruvankadu, asserting that the petitioner has got the right to have the services of legal practitioners as the charge against the petitioner is one of misappropriation which, if proved, will entail serious consequences. The department replied to the petitioner's counsel stating that the request of the counsel to appear on behalf of the petitioner in the departmental enquiry cannot be complied with. The petitioner was, however, intimated by a letter, dated 4th May, 1970, by the Department stating that if the petitioner wants, he can have the assistance of another Government servant to defend him at the enquiry. But the petitioner, however did not appear before the Enquiry Officer nor take part in the enquiry. This attitude appears to have been adopted by the petitioner as a protest against the refusal of the department to permit the petitioner to have the services of a counsel in defending him during the enquiry proceedings.

3. As a result of the petitioner's non-participation in the enquiry, the enquiry proceeded *ex parte* and ultimately, the Enquiry Officer found him guilty of all the charges levelled against him. On the

basis of the said findings, the petitioner was dismissed from service by an order, dated 30th August, 1972. Later, the petitioner filed an appeal to the Director-General, Ordnance Factories, Calcutta, the appellate authority. The said appeal was, however, dismissed holding that the statutory procedure has been complied with, that the findings are justified, that the penalty imposed is adequate and that there is no reason or mitigating circumstances to modify the punishment imposed. Aggrieved against the original order of dismissal as affirmed by the appellate authority, the petitioner has come to this Court and seeks a writ of *certiorari* to quash the original order of dismisasl as affirmed by the appellate order.

4. One of the grounds of attack against the order of dismissal is that the petitioner was not given a due and proper opportunity to defend himself and that, therefore, there is a clear violation of the principles of natural justice in the conduct of the enquiry as against him. It is contended that as soon as he was informed of the enquiry contemplated against him in relation to the charges levelled against him, he requested for permission to engage a counsel, having regard to the seriousness of the charge, but the department has, without any justification, rejected the said request, that this rejection had resulted in the denial of a fair and reasonable opportunity for the petitioner to defend himself in the departmental enquiry, and that therefore, the order of dismissal cannot, legally, be sustained. In support of this contention, the learned counsel for the petitioner referred to the decision of the Supreme Court in *C. L. Subramaniam* v. *The Collector of Customs, Cochin*[1], and submitted that in view of the said decision of the Supreme Court, the order of dismissal impugned in the writ petition should be set aside. In the case before the Supreme Court, the delinquent officer sought the permission of the Enquiry Officer to engage a legal practitioner. But that request was refused on the ground that the presenting officer was not a legal practitioner. The Supreme Court held that such a rejection is violative of sub-rule 5 of rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, and therefore, the petitioner cannot be taken to have been given a reasonable opportunity to defend himself. As I have already stated, the reason for rejecting the petitioner's request to engage a legal practitioner, in this case, is that the department has not engaged a legal practitioner to present its case before the enquiry officer and therefore, the petitioner, also, is not entitled to have the assistance of a legal practitioner. As pointed out by the Supreme Court, the reasoning given in the order for rejecting the petitioner's request for engaging a legal practitioner is not quite correct or germane.

5. We are concerned in this case with sub-rule 8 of rule 14 which is as follows:

> "The Government servant may take the assistance of any other Government servant to present the case on his behalf but may not engage a legal practitioner for the purpose unless the presenting officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits."

The rule contemplates permission being given to the petitioner for the engagement of a legal practitioner on two grounds: (1) the presenting officer happens to be a legal practitioner; or (2) the circumstances of the case warrant such an appointment. The department in this case has rejected the request of the petitioner only on the ground that the presenting officer was not a legal practitioner. But whether the circumstances of the case justified the engagement of a legal practitioner by the petitioner has not been considered, at all. Therefore, it has to be taken that the sub-rule 8 of rule 14 has not been followed in this case in rejecting the petitioner's request for engaging a legal practitioner. In the case before the Supreme Court, under similar circumstances, the Supreme Court has

1. (1972) 3 S.C.R. 485: (1973) 2 S.C.J. 488: A.I.R. 1972 S.C. 2178.

held that there was not a fair and reasonable opportunity given to the delinquent officer in defending himself at the enquiry. Following the decision of the Supreme Court, I have to hold that the petitioner did not have a reasonable opportunity to defend himself at the enquiry. Having regard to the serious nature of the charges framed against the petitioner, the Enquiry Officer would have been justified in permitting the petitioner to engage a legal practitioner. For these reasons, I have told that there has been a contravention of such-rule 8 of rule 14 in that the petitioner's request for the engagement of a legal practitioner has been arbitrarily rejected and that the petitioner did not have a reasonable opportunity to defend himself. Hence the impugned order is liable to be struck down and it is hereby struck down. Having regard to the fact that the impugned order has been set aside only on the ground that the petitioner did not have a reasonable opportunity to defend himself, the Department is entitled to conduct the enquiry *de novo* on the basis of the same charges after giving a reasonable opportunity to the petitioner to defend himself. No costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

Adhu by Power Agent Mohamed Ibrahim .. *Petitioner**

v.

V. M. Palaniswamy Gounder .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 2 (2), 14 (1) (b)—*"Building"—Lease of land with masonry structure —Petition for eviction—Contention by tenant that the dominant intention being the lease of the land the Rent Controller had no jurisdiction — Petition for demolition and reconstruction — Maintainability not questioned on merits—Bringing in theory of dominant intention not warranted — Existence of a building gave jurisdiction to Rent Controller.*

The revision petitioner, a tenant challenged the validity of the order of eviction passed against him as confirmed by the lower authorities on the ground that what was leased to him was an extensive vacant sites to enable him to run a timber depot, and the mere fact that there existed a masonry structure on the site would not clothe the Rent Controller with jurisdiction to proceed under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960.

Held: The definition of "Building" in section 2 (2) of the Act (XVIII of 1960) was an inclusive definition. It was a definition in favour of the landlord so that the matter may be put beyond controversy. Where the building alone was let if there was a garden or ground or out-house appurtenant to or let along with such building, they would also be taken in and the jurisdiction of the Rent Controller could not be ousted on that ground. A perusal of the lease deed disclosed that the masonry structure formed part of the demise. There was

* C.R.P. No. 877 of 1975. 22nd June, 1977.

no question of a building being appurtenant to a land. That apart, if the buildings were let along with the ground, having regard to the inclusive definition, the meaning of the building gets expanded. Whatever may be the definition in the Act, there was no warrant to bring in the theory of dominant intention. Nor again, could there be any such thing as composite lease. The demised portion consists of land and building. The existence of the building which was undoubtedly a part of the demise did clothe the Rent Controller with the jurisdiction. [*Para*. 3.]

Added to this, when the landlord filed the petition for demolition and reconstruction of the building, the tenant did not question its maintainability as seen from the judgment of the revisional authority. This was an added point in favour of the respondent. [*Para*. 4.]

Cases referred to:—

Palaniappa Chettiar v. *Vairavan Chettiar,* (1960) 1 M.L.J. (N.R.C.) 29; *Jugal Kishore* v. *Ashok Mills,* A.I.R. 1961 Pat. 330.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the Order of the Court of the District Judge (Appellate Authority) Coimbatore (West) dated 10th January, 1975 and made in C.R.P. No. 363 of 1973 (R.C.A. No. 129 of 1972, on the file of the Court of the Subordinate Judge (Principal) Coimbatore), against (R.C. O.P. No. 430 of 1965, on the file of Rent Controller and District Munsif, Coimbatore).

S. Nainarsundaram, V. Natarajan and *Nicholas,* for Petitioner.

S. V. Jayaraman and *V. Kannan,* for Respondent.

The Court made the following

ORDER.—The revision petitioner, a tenant undaunted by failures in all the Courts below, has come up to this Court challenging the validity of an order of eviction passed against him in R.C.O. P. No. 430 of 1965 which was confirmed by the lower authorities both in appeal and revision. He challenged the order on the ground that what was demised in his favour was a mere extensive vacant site to enable him to run a timber depot. The mere fact that there exists a masonry structure, which the learned counsel for the petitioner (Mr. Nainarsundaram) admits, will not clothe the Rent Controller with the jurisdiction to proceed with the matter under the Tamil Nadu Buildings (Lease and Rent, Control) Act (XVIII of 1960) (as amended by Tamil Nadu Act XXIII of 1973). According to him, if the dominant intention was to carry on a timber depot, the definition of "building" under section 2 (2) of the Tamil Nadu Act (XXIII of 1973) would not take in such a lease. In support of this argument, the learned counsel for petitioner cites the decisions in *Palaniappa Chettiar* v. *Vairavan Chettiar*[1] and *Jugal Kishore* v. *Ashok Mills*[2]. The mere existence of a masonry structure would not mean that it would constitute a building within the meaning of the Act since that was a negligible portion. Under similar circumstances, the Patna High Court has ruled concerning the definition in the Patna Act that the Rent Control Court would not have jurisdiction. Therefore, that reasoning will have to prevail. From that point of view, the orders of the Courts below are unsustainable.

2. Mr. M. R. Narayanaswamy, learned counsel for the respondent, would draw my attention to the definition of "building" occurring in section 2 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, and state that there is absolutely no warrant to import the theory of dominant intention. On the contrary, the definition of "building" is unambiguous and clear, it being an inclusive definition. The fact that it includes the garden, grounds and out-houses let along with the building would be enough to attract the jurisdiction of the Rent Controller. Whatever may be the view of the Patna High Court, so long as this definition is clear and unambiguous there-

1. (1960) 1 M.L.J. 29 (S.N.).
2. A.I.R. 1961 Pat. 330.

is no scope for applying the theory of dominant intention. The decision in *Palaniappa Chettiar* v. *Vairavan Chettiar*[1], merely defines the word "appurtenant" and that is not relevant to the facts of this case. Finally it is submitted that when the finding relating to the *bona fide* requirement of the landlord under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Tamil Nadu Act XXIII of 1973) had not been disputed, it would only mean that the jurisdiction of the Rent Controller had been conceded because the landlord in that application sought to demolish and reconstruct his building.

3. In order to appreciate the point involved in this revision, I need refer to the definition of "building" occurring in section 2 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act which reads as follows:—

> "2 (2) 'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes (*a*) the garden, grounds and out-houses, if any, appurtenant to such building, or part of such building or hut and let or to be let along with such building or hut,......"

The first thing that requires to be noted is that it is an inclusive definition, as rightly pointed out by the learned counsel for the respondent (landlord). The reason why I want to rather stress this aspect is, because it is a definition in favour of the landlord so that the matter may be put beyond controversy. Where the building alone is let if there is a garden or ground or out-house appurtenant to or let along with such building, they would also be taken in and the jurisdiction of the Rent Controller cannot be ousted on that ground. In the instant case, the learned counsel for the petitioner does not dispute the existence of the masonry structure which as of fact has been found by the Commissioner, appointed by the Court below. Whatever it may be. I proceed on the basis that a masonry structure does exist. A perusal of the lease deed also discloses that the masonry structure formed part of the demise. However, what is contended by the learned counsel for the petitioner is that in an extensive land, the mere existence of a masonry structure which is on a negligible portion does not clothe the Rent Controller with the jurisdiction. Therefore, the theory of dominant intention must be applied. I have no doubt in my mind that this theory of dominant intention can never be imported into the definition extracted above, which is clearly worded without any ambiguity whatsoever. There is no question of a building being appurtenant to a land. That apart, if the buildings were let along with the ground, having regard to the inclusive definition, the meaning of the building gets expanded. In this view, I am, with great respect, unable to agree with the view taken by the learned Judge of the Patna High Court. Whatever may be the definition in the Act, I see no warrant to bring in the theory of dominant intension. Nor again, can there be any such a thing as composite lease. The demised portion consists of land and building. The existence of the building which is undoubtedly a part of the demise does clothe the Rent Controller with the jurisdiction. The decision in *Palaniappa Chettiar* v. *Vairavan Chettiar*[1], does not afford any assistance to the petitioner since that case merely dealt with the meaning of "appurtenant". Nor again, am I able to agree with the learned counsel for the petitioner that it must be proved by the landlord that the demised land is appurtenant to the buildings. I say so because the definition includes even the land let along with such building. In the instant case, at the risk of repetition, I must say that both the land and the masonry structure formed part of single demise. Therefore, I find it very difficult to appreciate the argument of the learned counsel for the petitioner that the existence of the building on a negligible portion when extensive land has been demised for the purpose of running a timber depot, would take

1. (1960) I M.L.J. 29 (S.N.).

1. (1960) 1 M.L.J. 29 (S.N.).

out the jurisdiction of the Rent Controller.

4. Added to this, I find that when the landlord filed the petition for demolition and reconstruction of the building, the tenant did not question the maintainability as seen from the judgment of the revisional authority. This is an added point in favour of the respondent.

5. As rightly pointed out by the learned revisional authority (District Judge) that this case has a chequered career, I am not inclined to grant more than one month's time to hand over vacant possession.

6. The revision will stand dismissed with costs. Time to vacate one month.

S.J. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. D. Koshal, J.*

K. N. E. Jaganatha Iyer .. *Petitioner**

v.

State of Madras represented by Special Secretary to Government Housing Department, Fort St. George, Madras-9, and others .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 5-*A*, 6, 7, 39 *and* 40—*Land Acquisition Rules, rule* 3 (b)—*Constitution of India* (1950), *Article* 226—*Acquisition of land—Formation of road in T. V. S. Nagar — Objections filed under section* 5-*A—Acquisition for public purpose to wit, for the formation of a road to T. V. S. Co-operative Society Ltd., Madurai—Challenge—Effect of Government making even a token contribution towards compensation—Notice of objection not given to the concerned Department—Notice under rule* 3 (b) *to the concerned Department necessary—Proceedings held illegal and struck down—*Certiorari *issued.*

In an acquisition proceeding, the petitioner filed his objection to the acquisition, under section 5-A of the Land Acquisition Act. The acquisition was being made "for a public purpose, to wit, for the formation of a road to T. V. S. Co-operative Building Society Ltd., Madurai". The petitioner challenged the declaration under section 6 on the grounds that the procedure detailed in sections 39 and 40 of the Act had not been followed and that a notice as contemplated by rule 3 (*b*) had not been issued to the concerned department of the Government.

Held: It was now settled law that if the Government made even a token contribution towards the compensation to be paid for the land, the land need not be acquired under the provisions of sections 39 and 40 of the Act even though the bulk of the price was paid by the interested company, so long as the purpose of the acquisition could be legitimately described as a public purpose.

[*Para.* 3.]

When the land was acquired for a public purpose and the Government paid for it wholly or in part, albeit through a token contribution, the land could not be said to have been acquired "for the company" nor can the company be said to be "requiring the land" in the sense in which that expression was used in sub-rule (*b*) of rule 3 and that in such a case the notice had to go to the concerned department of the Government. No such notice having admittedly been given, the proceedings held by the Revenue Divisional Officer subsequent to the presentation of the objections by the petitioner under section 5-A of the Act should be held to be illegal and liable to be struck down.

[*Para.* 4.]

Cases referred to:—

Somawanti v. *State of Punjab,* A.I.R. 1963 S.C. 151; *Inderjit C. Parekh* v. *State of Gujarat,* A.I.R. 1975 S.C. 1182; *Mangalabhai* v. *State of Gujarat,* A.I.R. 1964 Guj. 82; *State of Mysore* v. *V. K. Kangan,* (1976) 2 S.C.C. 895: A.I.R. 1975 S.C. 2190.

Petition under Article 226 of the Constitution of India, praying that in the cir-

*W.P.No. 5755 of 1973.

4th November, 1976.

cumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Acquisition proceedings relating to petitioner's lands in S. No. 127|1B of Madakulam village, Madurai South Taluk, Madurai District and the notification of the 1st respondent in G.O.R. No. 366, Housing dated 20th July, 1973 and published in Tamil Nadu Government Gazette, dated 15th August, 1973 from the 1st respondent and quash the said notification.

O. V. Baluswami and *O. V. Natesan*, for Petitioner.

The Court made the following

ORDER.—The petitioner owned land bearing survey No. 127 |1 and having an extent of 14 cents in the village of Madakulam in Madurai South Taluk, Madurai district. That land was acquired by the Government of Tamil Nadu for the avowed purpose of "formation of a road in T.V.S. Nagar". The locality known as T.V.S. Nagar is a colony owned by the T.V.S. Co-operative Building Society (hereinafter referred to as the Society). The notification under sub-section (1) of section 4 of the Land Acquisition Act (hereinafter referred to as the Act) was published on the 25th of February, 1972. The petitioner filed his objections under section 5-A of the Act after the 3rd of April, 1972, when he was served with a notice in that connection. The enquiry into the objections was held on the 29th April, 1972 without any notice thereof having been issued either to the Society or the concerned department of the Government. On the 28th of May, 1972, a copy of the objections filed by the petitioner was sent to the Society which submitted its reply thereto on the 9th of June, 1972. That reply was communicated to the petitioner through a letter dated 24th of June, 1972 issued by the Revenue Divisional Officer (hereinafter referred to as the R.D.O.) Madurai, who was conducting the acquisition proceedings. The petitioner received the said reply on the 28th of June, 1972 and on that date itself the R.D.O. sent his report in relation to the acquisition to the Government. A declaration under section 6 of the Act was published on the 27th of September, 1972. It stated that the petitioner's land was needed "for a public purpose, to wit, for the formation of a road to T.V.S. Co-operative Building Society Ltd., Madurai."

2. The petitioner is aggrieved by the acquisition proceedings which he seeks to have quashed by the issuance of a writ of *certiorari* through this petition under Article 226 of the Constitution of India.

3. The first contention raised on behalf of the petitioner is that the Society is a "Company" within the meaning assigned to that expression in clause (*e*) of section 3 of the Act, that the acquisition was made for that company and that therefore, the procedure detailed in sections 39 and 40 of the Act should have been followed to the exclusion of that prescribed by sections 6 to 37 which the R.D.O. acted upon. The provisions of clause (*e*) of section 3 and of sections 39 and 40 are reproduced below:

"3. In this Act, unless there is something repugnant in the subject or context.

. . . .

(*e*) the expression "Company" means a company registered under the Indian Companies Act, 1882, or under the (English) Companies Act, 1862 to 1890, or incorporated by an Act of Parliament of the United Kingdom or by an Indian law, or by Royal Charter or Letters Patent and includes a society registered under the Societies Registration Act, 1860, and a registered society within the meaning of the Co-operative Societies Act, 1912, or any other law relating to co-operative societies for the time being in force in any State."

"39. The provisions of sections 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any company, unless with the previous consent of the appropriate Government, nor unless the Company shall have executed the agreement hereinafter mentioned."

"40. (1) such consent shall not be given unless the appropriate Govern-

ment be satisfied, either on the report of the Collector under section 5-A, sub-section (2), or by an enquiry held as hereinafter provided.

(*a*) that the purpose of the acquisition is to obtain land for erection of dwelling houses for workmen employed by the company or for the provisions of amenities directly connected therewith, or

(*aa*) that such acquisition is needed for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose; or

(*b*) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public."

"(2) Such enquiry shall be held by such officer and at such time and place as the appropriate Government shall appoint."

Such officer may summon and enforce attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the Code of Civil Procedure in the case of a Civil Court."

Although in the counter-affidavit filed on behalf of the State Government, it was contended that the society was not a company as defined in clause (*e*) above extracted, that stand is not seriously pressed at the hearing in view of the definition of the expression "Company" clearly stating that it would include a registered society within the meaning of the Co-operative Societies Act, 1912, or any other law relating to co-operative societies for the time being in force in any State. That the society is a society so registered is not disputed and it must therefore be held that it is a 'company' as defined in the said clause. All the same the land in dispute cannot be said to have been acquired for the society. In this connection the provisions of sub-section (1) of section 5-A, of sub-sections (1) and (3) of section 6 and of section 7 of the Act are illuminating and are extracted below:

"5-A. (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, within thirty days after the issue of the notification, object to the acquisition of the land or of any land in the locality, as the case may be."

"6. (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (1) irrespective of whether one report or different reports has or have been made (wherever required) under section 5-A, sub-section (2)."

* * * *

"(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

"7. Whenever any land shall have been so declared to be needed for a public purpose, or for a company, the appropriate Government, or some officer authorized by the appropriate Government in this behalf, shall direct the Collector to take order for the acquisition of the land."

These provisions leave no room for doubt that land may be acquired by the State Government for either of two purposes, namely—

(1) for a public purpose, and

(2) for a 'company',

which are mutually exclusive of each other. Nor is it in view of the provisions of section 40 of the Act true that when land is acquired for a company, the purpose of the acquisition has to be a public purpose or something akin to a public purpose; but then the Government concerned does not acquire it on its own, but acquires it for the company concerned and at the company's own expense. That does not however mean that if a company has interest in the acquisition, the Government cannot acquire the land by itself, provided the purpose of the acquisition can be described as a public purpose. It is now settled law (see the decisions in *Somawanti* v. *State of Punjab*[1]; *Inderjit C. Parekh* v. *State of Gujarat*[2] and *Mangalabhai* v. *State of Gujarat*[3]; that if the Government makes even a token contribution towards the compensation to be paid for the land, the land need not be acquired under the provisions of sections 39 and 40 of the Act even though the bulk of the price is paid by the interested company, so long as the purpose of the acquisition can be legitimately described as a public purpose. In the present case the purpose of the acquisition was the construction of a road to the T.V.S. Colony, which is said to be a very big habitation populated by members of the society which carries on the activity of building houses. In view of the general housing shortage in the country, such activity is certainly one relatable to public utility and the facility of the proposed road cannot be divorced from the concept of a public purpose. With this proposition the learned counsel for the petitioner does not have any serious dispute. His main argument in support of the contention is that the acquisition having been made in pursuance of a demand therefor from the society and the society having paid the bulk of the price the acquisition must necessarily attract the provisions of sections 39 and 40 of the Act. In view of the fact however that the acquisition is for a public purpose and is in part paid

1. (1963) 2 S.C.J. 35 : A.I.R. 1963 S.C. 151.
2. (1975) 1 S.C.C. 824 : A.I.R. 1975 S.C. 1182.
3. A.I.R. 1964 Guj. 82.

for by the Government the case falls squarely within the dictum of their lordships of the Supreme Court in *Somawanti's case*[1] and *Inderjit's case*[2]. The contention is therefore rejected as untenable.

4. The only other contention pressed on behalf of the petitioner is that the proceedings held by the R.D.O. were void inasmuch as they were taken in contravention of the provisions of sub-rule (*b*) of rule 3 of the Rules framed under sub-section (1) of section 55 of the Act. That sub-rule states:

> "(*b*) If any objections are received from a person interested in the land and within the time prescribed in sub-section (1) of section 5-A, the Collector shall fix a date for hearing the objections and give notice thereof to the objector as well as to the department or company requiring the land, where such department is not the Revenue Department. Copies of the objections shall also be forwarded to such department or company. The department or company may file on or before the date fixed by the Collector a statement by way of answer to the objections and may also depute a representative to attend the enquiry."

In view of the fact that the acquisition was made by the Government for a public purpose as held above, it was incumbent on the R. D. O. to give notice of the objections by the petitioner to the concerned department which in this case was the Housing Department. That no such notice was given is admitted on all hands. The provisions of sub-rule (*b*) being mandatory, the absence of the notice to the concerned department would vitiate the proceedings as laid down in *State of Mysore* v. *V. K. Kangan*[3]. Faced with this situation, learned counsel for the Government contends that in the present case the land was required for a company (that is, the society) that notice was given to that

1. (1963) 2 S.C.J. 35 : A.I.R. 1963 S.C. 151.
2. (1975) 1 S.C.C. 824 : A.I.R. 1975 S.C. 1182.
3. (1976) 2 S.C.C. 895 : (1976) 1 S.C.R. 369 : A.I.R. 1975 S.C. 2190.

company and that the directions contained in the sub-rule were thus fully complied with. This contention, in my opinion, is wholly without substance. As stated earlier, for an acquisition to be "for a company" it has to be paid for entirely by the company, which is not the case here and that is why the acquisition has been upheld in rejection of the first contention raised by learned counsel for the petitioner. If it could be spelt from the facts of this case that the land was acquired "for a company", the proceedings held by the R. D. O. would be liable to be quashed for the simple reason that they did not satisfy the requirements of sections 39 and 40 of the Act. From the discussion held under the first contention raised on behalf of the petitioner it follows that the expression "for the company" as used in sections 5-A, 6, 7 and 30 of the Act has a special meaning, that is, that it must be financed wholly by the company concerned and not by the Government to any extent whatever. The expression "company requiring the land" occurring in sub-rule (*b*) above extracted must, in my opinion, be interpreted in the light of the meaning of the expression "for the company" in the Act. Thus interpreted, the sub-rule would mean that when land is acquired by the Government but is solely paid for by the company concerned the notice of which the rule talks has to be given to the company but that when the land is acquired for a public purpose and the Government pays for it wholly or in part, *albeit* through a token contribution, the land cannot be said to have been acquired "for the company" nor can the company be said to be "requiring the land" in the sense in which that expression is used in sub-rule (*b*) and that in such a case the notice has to go to the concerned department of the Government. No such notice having admittedly been given, the proceedings held by the R.D.O. subsequent to the presentation of the objections by the petitioner under section 5-A of the Act must be held to be illegal and liable to be struck down.

5. It may also be stated here that the enquiry held by the R. D. O. was conducted without a prior notice even to the society. As pointed out earlier a copy of the objections was sent to the society on the 28th of May, 1972, that is, full one month after the enquiry took place so that the provisions of the rule must be held to have been contravened whether or not the society can be deemed to be "requiring the land" within the meaning of sub-rule (*b*). As it is, however, a notice had to be sent not to the society but to the concerned department as concluded by me earlier.

6. In the result, the petition succeeds and is accepted and the proceedings held by the R. D. O. subsequent to the presentation by the petitioner of his objections under section 5-A of the Act are quashed. It will of course be open to the R. D. O. to continue the proceedings in the light of the observations made above and in accordance with law from the stage they had reached when the petitioner filed his objections. The parties are left to bear their own costs.

S.J.　——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. D. Koshal, J.*

N. Soundarapandian .. *Petitioner**

v.

Vallioor Panchayat Union Council represented by the Commissioner, Tirunelveli District and another
.. *Respondents.*

Tamil Nadu Panchayats Act (XXXV of 1958), section 159 and the Rules framed thereunder—Application to Panchayat by second respondent for grant of licence to instal machinery for running a new rice mill—Licence granted by Panchayat—Order challenged by petitioner—Allegation that reports of the Chief Inspector of the Factories and the Director of Town Planning were not called for as required—Expiry of 2 months since date of application and no orders communicated to respondent—Effect.

It is common ground between the parties that no orders on the application made

* W.P. No. 3248 of 1972.　*9th March*, 1977.

by respondent No. 2, was communicated to him within two months after the application was made in accordance with the provisions of sub-section (3) of section 159 of the Tamil Nadu Panchayats Act, 1958 and the rule thereunder. Therefore the application must be deemed to have been allowed, notwithstanding other rules which enjoin the panchayat to refer the matter to the Chief Inspector of Factories and to the Director of Town Planning. The impugned order having been made in conformity with the provisions of sub-section (3) no fault can be found therewith. [*Para.* 2.]

Case referred to:—

Panchayat Union Council v. *Muttom*, I.L.R. (1970) 2 Mad. 537.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the resolution No. 139 of 1971, dated 10th May, 1971 passed by the 1st respondent in connection with the issue of licence to the 2nd respondent to start a new rice mill, as being invalid and vitiated by an error of law apparent on the face of the record and quash the same.

G. Ranganathan, for Petitioner.

G. Ramaswamy, for 1st Respondent.

K. Alagiriswami, for 2nd Respondent.

The Court made the following

ORDER.—The second respondent made an application dated the 11th of November, 1970 to the Vallioor Panchayat Union (hereinafter referred to as the Panchayat) praying for the issue of a licence to install machinery for running a new rice mill in Chottikulam. The panchayat granted the application by an order dated the 10th of May, 1971 which is challenged by the petitioner on the ground that according to the rules framed under the Tamil Nadu Panchayats Act, 1958 (hereinafter referred to as the Act) it was incumbent on the panchayat to call for the report of the Chief Inspector of Factories and the Director of Town Planning before granting the application, that neither of these two authorities was approached by the panchayat, and that, therefore, the application was granted in contravention of the said rules. The petitioner prays that the order dated the 10th of May, 1971 and mentioned above be quashed by a writ of *certiorari*.

2. Learned counsel for the respondent No. 2 banks on the provision of sub-section (3) of section 159 of the Act and a rule framed thereunder for the proposition that a period of two months having elapsed since the date of the said application without respondent No. 1 having communicated his orders thereon, the application stood automatically sanctioned. Sub-section (3) reads:

> "Save as aforesaid, if orders on an application for any such licence or permission are not communicated to the applicant within thirty days or such longer period as may be prescribed in any class of cases after the receipt of the application by the executive authority of the panchayat or the commissioner, the application shall be deemed to have been allowed for the period, if any, for which it would have been ordinarily allowed and subject to the law, rules, bye-laws and regulations and all conditions ordinarily imposed".

The relevant rule framed by the Government states:

> "In case where any outside authority, such as the District Health Officer or the Inspector of Factories or any other officer has to be consulted before passing orders on an application for any licence or permission or renewal thereof, made under the Madras Panchayats Act, 1958 (Madras Act XXXV of 1958) or any rule, bye-law or regulation made thereunder, orders in respect of such application shall be communicated to the applicant within sixty days after the receipt of the application by the executive authority of the panchayat".

It is common ground between the parties that no orders on the application made by respondent No. 2 were communicated to him within two months

after the application was made in accordance with the provisions of sub-section (3) and the Rule above extracted. Therefore the application must be deemed to have been allowed, notwithstanding other Rules which enjoin on respondent No. 1 to refer the matter to the Chief Inspector of Factories and the Director of Town Planning. This conclusion finds support from *Panchayat Union Council* v. *Muttom*[1], a case directly in point. The impugned order having been made in conformity with the provisions of sub-section (3) above extracted, no fault can be found therewith.

3. In the result the petition fails and is dismissed but with no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

V. Kamalanathan .. *Petitioner**

v.

E.I.D. Parry Limited, Dare House, N. S. C. Bose Road, Madras

.. *Respondent.*

Civil Procedure Code (V of 1908), Order 37, rule 2—Promissory note—Suit on—Leave to defend granted subject to condition of deposit—Propriety of order.

The plaintiff filed a suit on a promissory note. The trial Court granted leave to defend on the ground that there was a triable issue as to whether the suit promissory note was got under coercion or compulsion and undue influence, but imposed a condition that the defendant should deposit a sum of Rs. 10,000. The defendant challenged the said order imposing the condition.

Held: In this case, the learned Judge, after having come to the conclusion that there was a triable issue, if he wanted to impose any condition, he should have given reasons as to why he was imposing the condition, notwithstanding his conclusion that the controversy gave rise to a triable issue. There was no finding that the defence was sham or not genuine. Under these circumstances, the learned Judge was obviously not justified in imposing the condition.

[*Para.* 3.]

Cases referred to:—

Milkhiram (India) Private Limited v. *Chamanlal Brothers*, (1966) 2 S.C.J. 606: A.I.R. 1965 S.C. 1698; *Mechelec Engineers and Manufacturers* v. *M/s. Basic Equipment Corporation*, A.I.R. 1977 S.C. 577; *Smt. Kiranmoyee Dassi* v. *Dr. J. Chatterjee*, (1945) 49 Cal.W.N. 246.

Petition under section 115 of Act V of 1908 paving the High Court to revise the Order of the Second Assistant Judge, City Civil Court, Madras dated 9th December, 1975 and passed in I.A. No. 2961 of 1975 in O.S. No. 8890 of 1974.

B. T. Seshadri, for *R. Desikan*, *V. R. Bikshceswaran* and *K. Raghunathan*, for Petitioner.

G. Gopinath, for Respondent.

The Court made the following

ORDER.—The defendant in O. S. No. 8890 of 1974 on the file of the City Civil Court, Madras, is the petitioner herein. He seeks to have the order of the II Assistant Judge, City Civil Court, Madras, dated 9th December, 1975, imposing a condition of deposit of Rs. 10,000 on or before 16th January, 1976 for granting him leave to defend the suit, revised. The suit itself was one for recovery of a sum of money due on a promissory note. One of the defences of the petitioner herein was that the promissory note was obtained under coercion, compulsion and undue influence by one Kalyanaraman. The learned II Assistant Judge has discussed this aspect of the matter in paragraph 12 of his order and, after referring to the conten-

1. I.L.R. (1970) 2 Mad. 537.
*C.R.P. No. 81 of 1976.

23rd April, 1977.

tions of the parties, stated towards the end of the paragraph:

"But suffice to say that there is a triable issue, whether the suit promissory note was got under coercion and compulsion and undue influence of Kalyanaraman".

Notwithstanding this conclusion, in paragraph 13 of the order the learned II Assistant Judge states:

"However, it is not a case in which unconditional leave can be granted. The petition will be allowed and leave will be granted to file the written statement and defend the suit on condition the petitioner deposits into Court Rs. 10,000 on or before 16th January, 1976 failing which this petition will stand dismissed. Call on 17th January, 1976".

2. Thus it will be seen that, having recorded his conclusion that there was a triable issue whether the suit promissory note was got under coercion, compulsion and undue influence of Kalyanaraman, the learned Judge has not given any reason as to why he was not giving unconditional leave to defend. Learned counsel for the petitioner contends that, once the Court has come to the conclusion that the controversy gives rise to a triable issue, then ordinarily the Court should grant unconditional leave to defend, that this is not a case in which the Court was justified in imposing the condition and that the Court itself has not given any reason why it was imposing the condition. On the other hand, learned counsel for the respondent contends that the Court must read the entire paragraph 12 of the order of the learned Judge, and even read between the lines, for finding out why the Court imposed the condition. Even after reading the entire paragraph 12, I am unable to discover or discern any reason why the learned Judge imposed the condition. In *Milkhiram (India), Private Limited and others* v. *Chamanlal Brothers*[1], the Supreme Court has laid down:

"It is indeed not easy to say in many cases whether the defence is a genuine one or not and, therefore, it should be left to the discretion of the trial Judge who has experience of such matters both at the bar and the Bench to form his own tentative conclusion about the quality or nature of the defence and determine the conditions upon which leave to defend may be granted. If the Judge is of opinion that the case raises a triable issue, then leave should ordinarily be granted unconditionally. On the other hand, if he is of opinion that the defence raised is frivolous or false or sham, he should refuse leave to defend altogether. Unfortunately, however, the majority of cases cannot be dealt with in a clear-cut way like this and the Judge may entertain a genuine doubt on the question as to whether the defence is genuine or sham or in other words whether it raises a triable issue or not. It is to meet such cases that the amendment to Order 37, rule 2, made by the Bombay High Court contemplates that even in cases where an apparently triable issue is raised the Judge may impose conditions in granting leave to defend. Thus this is a matter in the discretion of the trial Judge and in dealing with it he ought to exercise his discretion judiciously. Care must be taken to see that the object of the rule to assist the expeditious disposal of commercial causes to which the order applies, is not defeated. Care must also be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In a matter of this kind, it would be undesirable and inexpedient to lay down any rule or general application".

3. Relying on this passage, learned counsel for the respondent contends that, notwithstanding the conclusion of the learned Judge that there was a triable issue, still he had a discretion to impose the condition, because the Supreme Court itself has laid down that leave must be granted unconditionally only ordinarily, thereby implying that there may be circumstances under which, even if there is a triable issue, leave should not

1. (1966) 2 S.C.J. 606 : A.I.R. 1965 S.C 1698.

be granted unconditionally. Stated as a general proposition of law, no exception can be taken to the same. But, as cautioned by the Supreme Court, in exercising the discretion, care must be taken to see that real and genuine triable issues are not shut out by unduly severe orders as to deposit. In this case the learned Judge, after having come to the conclusion that there was a triable issue, if he wanted to impose any condition, he should have given reasons as to why he was imposing the condition, notwithstanding his conclusion that the controversy gave rise to a triable issue. There is no finding that the defence was sham or not genuine. Under these circumstances, the learned Judge was obviously not justified in imposing the condition.

4. The Supreme Court itself in a subsequent decision has explained the circumstances under which conditions can be imposed. In *Machelec Engineers and Manufacturers* v. *M/s. Basic Equipment Corporation*[1], the Supreme Court referred to a decision of the Calcutta High Court with approval and observed as follows:

> 5. "In *Smt. Kiranmayee Dassi* v. *Dr. J. Chatterjee*[2], Das, J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 37, Civil Procedure Code in the form of the following propositions (at p. 253):
>
> '(*a*) If the defendant satisfies the Court that he has a good defence to the claim on its merits, the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (*b*) If the defendant raises a triable issue indicating that he has a fair or *bona fide* or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (*c*) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend, but in such a case the Court may in its discretion impose conditions as to the time or mode of trial, but not as to payment into Court or furnishing security.
>
> (*d*) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine, then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.
>
> (*e*) If the defendant has no defence or the defence is illusory or sham or practically moonshine, then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed, if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition and thereby show mercy to the defendant by enabling him to try to prove a defence.'
>
> 6. "The case before us certainly does not fall within the class (*e*) set out above. It is only in that class of cases that an imposition of the condition to deposit an amount in Court before proceeding further justifiable."

Thus it will be clear that, in the opinion of the Supreme Court, the only cases in which the defendant can be asked to deposit money into Court as a condition for the grant of leave to defend are those covered by clause (*e*) in paragraph 8 extracted above, namely, where the defendant has no defence or the defence is illusory or sham or practically moonshine. That not being the case in the instant case, the learned Judge was not at all justified in imposing a condition by way of deposit of a sum of Rs. 10,000 into Court on or before 16th January, 1976. Consequently the civil revision petition is allowed, the condition

1. A.I.R. 1977 S.C. 577
2. (1945) 49 Cal.W.N. 246.

imposed by the learned Judge is set aside, and the petitioner herein is granted unconditional leave to defend. There will be no order as to costs.

S.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

R. Manickam and others .. *Petitioners**

v.

The Union Territory of Pondicherry, represented by Chief Secretary to Government of Pondicherry and another. .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 4 (1), 6—*Rules of Business of the Government of Pondicherry,* 1963, *rule* 46—*General Clauses Act (X of* 1897), *section* 3 (8), (b) (iii)—*Constitution of India* (1950), *Article* 239—*Land Acquisition—Notification followed by declaration by the Pondicherry Government S, R.O. No.* 3165, *dated 5th November,* 1973 — *Interpretation of* — *Validity of notification and declaration challenged on the ground that the action was initiated by the Government without obtaining the satisfaction of the Administrator* — Certiorari *issued.*

The Government of Pondicherry issued a notification under section 4 (1) of the Land Acquisition Act for acquiring certain lands. Overruling the objections of the petitioner, a declaration under section 6 was also issued. The petitioner challenged the validity of the notification and the declaration on the ground that in the instant case the State Government's satisfaction alone appeared and there was nothing to indicate that the Administrator, *viz.*, the Lieutenant-Governor was satisfied, which satisfaction alone was material.

Held: The Union Territories being directly administered by the President through his delegate the Lieutenant-Governor, it was his satisfaction that was material. [*Para.* 19.]

There were no standing orders under rule 46 of the Rules of Business of the Government of Pondicherry, 1963 concerning land acquisition. Therefore, the rules of business did not enable the State Government to deal with this matter. [*Para.* 21.]

Section 3 (8) (*b*) (iii) of the General Clauses Act only referred to the Administrator. The President of India, while administering the Union Territory of Pondicherry by virtue of Article 239 of the Constitution did not act as the head of the Central Government. It was in this context S.R.O. No. 3165, dated 5th November, 1963 becomes very important. [*Para.* 22.]

The authority to be satisfied was the Lieutenant-Governor of Pondicherry for the purpose of section 4 (1) and section 6 of the Land Acquisition Act. It was not shown in this case that there was any such satisfaction. On the contrary, it was admitted by the respondent that it was the concerned Minister who was satisfied. Therefore, the proceedings should be held to be illegal. [*Para.* 23.]

Cases referred to:—

T. M. Kanniyan v. *Income-tax Officer,* (1968) 1 I.T.J. 466: (1968) 2 S.C.J. 727: (1968) 2 S.C.R. 103: 68 I.T.R. 244: A.I.R. 1968 S.C. 637; *S. K. Singh* v. *V. V. Giri,* (1970) 2 S.C.J. 768: A.I.R. 1970 S.C. 2097; *H. L. Rodhey* v. *Delhi Administration,* A.I.R. 1969 Delhi 246; *Ghousia Begum* v. *Union Territory,* A.I.R. 1975 Mad. 345; *Shamsher Singh* v. *State of Punjab,* (1975) 1 S.C.R. 814: A.I.R. 1974 S.C. 2192; *Union of India* v. *Sripathi Ranjan Biswas,* (1976) 1 S.C.J. 522: (1975) 4 S.C.C. 699: (1976) 1 S.C.R. 268: A.I.R. 1975 S.C. 1755; *Ram Kishore Sen* v. *Union of India,* (1966) 1 S.C.R. 430: A.I.R. 1966 S.C. 644.

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*W.P.Nos. 688, 6480, 6481 of 1975 and 43 of 1976, 18th *October,* 1976.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records (1) of the 1st Respondent in G.O. Ms. No. 15, Revenue Department, dated 15th June, 1974 and quash the same (in W.P. No. 688 of 1975); (2) relating to the order of the Respondent in G.O. Ms. No. 28, dated 15th July, 1975 and published in the Pondicherry Gazette, dated 29th July, 1975 and quash the same in so far as it affects the petitioners (in W.Ps. Nos. 6480 of 1975 (P) and 6481 of 1975) and (3) of the Respondents relating to the declaration under section 6 of the Land Acquisition Act issued under G.O. Ms. No. 93, dated 5th August, 1975 (Revenue Department) and published in the Gazette of Pondicherry, dated 19th August, 1975 and quash the same in (W. P. No. 43 of 1976 P) in so far as it affects the petitioners.

K. K. Venugopal, for *J. Stanislas,* for Petitioner in W.P. No. 688 of 1975.

K. K. Venugopal, for *M. Krishnappan,* for Petitioners in W.P. Nos. 6480, 6481 of 1975 and 43 of 1976.

V. K. Thiruvenkatachari, for Government Pleader, for Pondicherry, in W.P. No. 6480 of 1975.

C. Krishnan, Government Pleader, for Pondicherry, for Respondent in W.P. Nos. 688 of 1975 and 43 of 1976.

The Court made the following

ORDER.—All these three writ petitions can be conveniently dealt with under a common judgment. It would be sufficient to note the facts in W. P. No. 6480 of 1975 alone, since the same question of law arises in all these cases.

2. The Government of Pondicherry issued a notification under section 4 (1) of the Land Acquisition Act of 1894 (hereinafter referred to as the Act) for acquiring certain lands in Korkadu village for the purpose of providing house-sites for Harijans. The said notification included the petitioner's lands. The notification is on the date, 9th of April, 1974. The petitioner filed the objections for the statutory enquiry under section 5-A of the Act. Those objections were overruled and section 6 declaration was issued in G.O. Ms. No. 28, dated 16th July, 1975. It was published in the Gazette of the Government of Pondicherry on 29th July, 1975. The petitioners were served with the notice under sections 9 and 10 of the Act. On a request made by the petitioners the enquiry as adjourned to 16th October, 1975. It is under these circumstances the writ petition has been preferred.

3. In attacking the land acquisition proceedings the following grounds are urged in the affidavit.

(1) The Act was extended to the Union Territory of Pondicherry by the Pondicherry (Laws) Regulation, 1963. The appropriate Government under the Act would mean the Central Government concerning an acquisition for the purpose of the Union. In relation to the acquisition of the land for any other purpose the appropriate Government concerning the Union Territory of Pondicherry is the Central Government. The powers and functions of the Central Government have been delegated to the Administrator, *viz.*, the Lieutenant-Governor of Pondicherry. Therefore, it is the Lieutenant-Governor who should be satisfied before the issue of section 4 (1) notification and section 6 declaration. In the instant case the petitioners believe it to be true and state that all the decisions were taken by the Minister-in-charge. Therefore it is illegal.

(2) The impugned notification under section 4 (1) has not been published in the name of the Administrator.

(3) There has not been a proper application of the mind since earlier it was decided not to acquire these lands as they are unsuitable for provision of house-sites for Harijans.

4. In the counter-affidavit it is stated that the expression "State Government" is defined in section 3 (60) of the General Clauses Act, 1897 as follows:

"as respects anything done or to be done after the commencement of the Constitution (Seventh Amendment) Act, 1956, shall mean, in a State, the Governor, and in a Union Territory, the Central Government."

Under section 3 (8) of the said Act, the Central Government shall, "in relation to the administration of Union Territory, the administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution" (and under section 2 (*i*) (*a*) of the Union Territories Act).

In the notifications under sections 4 and 6 the words "Lieutenant-Governor" have been specifically mentioned. The petitioner's contention that the notifications refer to the satisfaction of the Government not to the Lieutenant-Governor does not seem to be correct, since in the 4 (1) notification and in the declaration under section 6, special mention of the term 'Lieutenant-Governor' has been made. Further the order is issued in terms of section 4 (1) of the Land Acquisition Act. In the instant case the notification states that the Government of Pondicherry is satisfied that the land is needed for a public purpose. The notification after reciting the satisfaction of the Government states that the Lieutenant-Governor has made the appointment of Deputy Collector under the Land Acquisition Act. It is clear that the order is one made in the name of the Administrator (Lieutenant-Governor) of Pondicherry and it is authenticated by the Under-Secretary to Government as provided in the rules framed under section 46 (3) of the Government of Union Territories Act, 1963. In terms of that section the order so authenticated shall not be called in question on the ground that it is not made by the Administrator. Further as a matter of fact the order has been issued under the authority of the Chief Minister and Minister concerned who are authorised to dispose of the matter according to the business rules of the Government of Pondicherry. It is further submitted that the notification as published in the Gazette contains reference at the opening "The Government of Pondicherry" which is the administration of the Union Government through the Lieutenant-Governor and it refers twice to the Lieutenant-Governor as authorising the Deputy Collector and appointing him as Collector for the purpose of this Act. It is signed by the Under-Secretary to Government. The notification C.S.R.I., dated 1st July, 1963 and G.S.R. No. 4, dated 2nd May, 1967 containing the rules made by the Administrator under section 46 (3) of the Government of Union Territories Act, 1963 state that the orders and other instruments made and executed in the name of the Administrator (Chief Commissioner) shall be authenticated by the signature of the Chief Secretary, Deputy Secretary, or Under-Secretary, to the administration. Hence the notification under section 4 (1) of the Land Acquisition Act is legal and valid.

5. Mr. K. K. Venugopal, learned counsel for the petitioner draws my attention to Articles 239, 239-A and 240 of the Constitution of India. The Land Acquisition Act was extended to the Union Territory of Pondicherry under the Pondicherry (Laws) Regulation Act. Section 6 of that Act in laying down the rules of construction under clause (*b*) states that any reference to the State Government shall be construed as a reference to the Central Government including a reference to the Chief Commissioner. The Land Acquisition Act, when it talks of appropriate Government in the instant case concerning the Union Territory of Pondicherry, would be only the Central Government. The State Government cannot include Union Territory. In support of this submission, learned counsel relies on *T. M. Kanniyan* v. *Income-tax Officer, Pondicherry*[1]; *S. K. Singh* v. *V. V. Giri*[2] and *H. L. Rodhey* v. *Delhi Administration*[3]. The General Clauses Act under section 3 (8) (*b*) (*iii*) refers to Central Government in relation to the administration of a Union Territory, in this case, Pondi-

1. (1968) 1 I.T.J. 466 : (1968) 2 S.C.J. 727 : (1968) 2 S.C.R. 103 : 68 I.T.R. 244 : A.I.R. 1968 S.C. 637.
2. (1970) 2 S.C.J. 768 : A.I.R. 1970 S.C. 2097.
3. A.I.R. 1969 Del. 246.

cherry, the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution. Therefore, it is well settled that it is the Administrator who acts on behalf of the Central Government as the delegate of the President. In support of this submission, reliance is placed on *Ghousia Begum* v. *Union Territory, Pondicherry*[1]. If that be so, then it is the Lieutenant-Governor who should be satisfied concerning section 4 (1) notification as well as section 6 declaration.

6. Again under the Union Territories Act, section 18 speaks of the extent of legislative power. Section 21 resolves the inconsistency between laws made by Parliament and laws made by Legislative Assembly. Section 44 provides for a Council of Ministers, to aid and advise the Administrator in the exercise of his functions with respect to which the Legislative Assembly has power to make laws. Section 46 speaks of conduct of business which could be done by the Presidential allocation through rules of business to the Ministers. None of the above provisions can be of any assistance to contend that the State Government could exercise its satisfaction. Nor again can rule 46 be relied on since those rules applied only to business of State Government. In the instant case in so far as the State Government alone has been satisfied and there is nothing to indicate that the Administrator, *viz.*, the Lieutenant-Governor was satisfied which satisfaction alone is material, the notification under section 4 (1) as well as the declaration under section 6 must be held to be illegal and invalid.

7. In countering these submissions, Mr. V. K. Thiruvenkatachari appearing for the Government of Pondicherry submits as under:—In a Union Territory there is only Central Government, because it is not a State. The entire executive power belongs to the Union. The extent of the executive power is relatable to the Parliament's powers to make laws

1. A.I.R. 1975 Mad. 345.

under Article 246 of the Constitution. When Article 230 says, the Union Territories will have to be administered by the President, it means the Central Government. It has been so laid down in *Shamsher Singh* v. *State of Punjab*[1], and *Union of India* v. *Sripathi Ranjan Biswas*[2].

8. When there is a delegation, the Lieutenant-Governor occupies the place of the President so far as delegated matters are concerned. For what is not delegated, the Union Government can pass orders. Concerning those matters which were not delegated there are two aspects:—(1) The reserve field or what is called the non-ministerial field. In such a case, the Administrator will work as an Officer of the Central Government. (2) Regarding Ministerial field, he will act on the advice of the Council of Ministers. The Ministerial field is relatable to Lists II and III of 7th Schedule. The subject of land acquisition falls under item 42 of List III (Concurrent list).

9. When Article 239 speaks of "save as otherwise provided", it would include the Government of Union Territories Act of 1963. Apart from the fact that the business of the Government could be exercised by the allocation of such business to the Ministers under section 50 of the said Act, the Administrator and the Council of Ministers shall be subject to the general control of the President. The Lieutenant-Governor is the representative of the President. Those powers can be exercised through the Council of Ministers. The delegation under Article 239 of the Constitution is to bring in the Administrator. When section 2 (8) (*b*) (*iii*) talks of the Central Government, it is the Government of Pondicherry acting through the Administrator.

10. Added to this, there is also S.R.O. No. 3165, dated 5th November, 1973 which enables the Administrator to act

1. (1975) 1 S.C.R. 814 : A.I.R. 1974 S.C. 2192.

2. (1976) 1 S.C.J. 522: (1975) 4 S.C.C. 699 : (1976) 1 S.C.R. 268 : A.I.R. 1975 S.C. 1955.

concerning the matters under the Land Acquisition Act, which power again could be exercised by the Administrator with the aid and advice of the Cabinet of Pondicherry.

11. In reply Mr. K. K. Venugopal, argues the S.R.O. dated 5th November, 1963 by which the power is delegated to the Administrator would mean the Administrator can act for and on behalf of the President not on the aid or advice of the Cabinet.

12. Even assuming the Business Rules apply there are no standing orders under rule 46 except in regard to conditions of service of the civil service.

13. In order to appreciate the point in controversy it is very necessary for me to advert to the relevant provisions of law, both under the Constitution and also under the various statutes. Part VIII of the Constitution deals with the Union Territories. A reading of the Article 239 shows that every Union territory (Union Territory of Pondicherry) shall be administered by the President, through an Administrator. The Administrator in this case is the Lieutenant-Governor. Article 239-A which was introduced by the 14th amendment states:

> "(1) Parliament may be law create for any of the Union Territories of (Goa, Daman and Diu, (Pondicherry, Mizoram and Arunachal Pradesh)....
>
> (*a*) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or
>
> (*b*) a Council of Ministers,
>
> or both with such constitution, powers and functions, in such case, as may be specified in the law.
>
> (2) Any such law as is referred to in clause (1) shall not be an amendment of this Constitution for the purposes of Article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution:"

It is by virtue of this provision, the Parliament passed the Government of Union Territories Act, 1963 (Central Act XX of 1963). Again Article 240 reads:

> "(1) The President may make regulations for the peace, progress and good Government of the Union Territory of—
>
> (*a*) the Andaman and Nicobar Islands;
>
> (*b*) Lakshadweep;
>
> (*c*) Dadra and Nagar Haveli;
>
> (*d*) Goa, Daman and Diu;
>
> (*e*) Pondicherry;
>
> (*f*) Mizoram;
>
> (*g*) Arunachal Pradesh:
>
> (Provided that when any body is created under Article 239-A to function as a Legislature for the (Union Territory of Goa, Daman and Diu, (Pondicherry, Mizoram or Arunachal Pradesh), the President shall not make any regulation for the peace, progress and good Government of that Union Territory with effect from the date appointed for the first meeting of the Legislature:)
>
> (Provided further that whenever the body functioning as Legislature for the Union Territory of Goa, Daman and Diu, (Pondicherry, Mizoram or Arunachal-Pradesh) is dissolved, or the functioning of that body as such Legislature remains suspended on account of any action taken under any such law as is referred to in clause (1) of Article 239-A, the President may, during the period of such dissolution or suspension, make regulations for the peace, progress and good Government of that Union Territory).
>
> (2) Any regulation so made may repeal or amend any Act made by Parliament or (any other law) which is for the time being applicable to the Union Territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to that territory."

This Article may be referred to for the sake of completion.

14. On 16th August, 1962 the *de jure* transfer of the Union Territory of Pondicherry took place. By Central Act XLIX of 1962, Pondicherry (Administration) Act, 1962 making provision for the administration of Pondicherry was passed. By virtue of the 14th amendment passed on 28th December, 1962, Pondicherry was included as a Union Territory. On 1st July, 1963 Act XX of 1963 was brought into force in Pondicherry.

15. By Pondicherry (Laws) Regulation which was promulgated in exercise of the powers conferred by Article 240 of the Constitution by the President, the Land Acquisition Act was one of the Acts occurring under the first schedule. Section 2 of the Act, when it speaks of an Act refers to an Act specified in the First Schedule. It is by virtue of this Pondicherry (Laws) Regulation, 1963, the Land Acquisition Act was extended to Pondicherry.

16. Section 6 of the said Act in subsection (1) (*b*) states that any reference to the State Government shall be construed as a reference to the Central Government and also as including a reference to the Chief Commissioner.

17. Turning to the Land Acquisition Act, section 3 (*ee*) states the expression "appropriate Government" means, in relation to acquisition of land for the purposes of the Union, the Central Government, and, in relation to acquisition of land for any other purposes, the State Government. The State Government cannot include Union Territories.

18. In *T. M. Kanniyan* v. *Income-tax Officer, Pondicherry*[1], it was laid down in paragraph 4 as follows:

> "In *Ram Kishore Sen* v. *Union of India*[2], it was pointed out that having regard to Article 367, the definition of "State" in section 3 (58) of the General Clauses Act, 1897 applies for the interpretation of the Constitution unless there is anything repugnant in the subject or context. Under that definition, the expression "State" as respects any period after the commencement of the Constitution (Seventh Amendment) Act, 1956, 'shall mean a State specified in the First Schedule to the Constitution and shall include a Union Territory'. But this inclusive definition is repugnant to the subject and context of Article 246. There, the expression 'State' means the States specified in the First Schedule."

Having regard to the definition of 'appropriate Government' occurring under section 3 (*ee*) of the Act and in the light of the above judgment, it only refers to the Central Government. The Lieutenant-Governor exercises the power of the President as his delegate. Therefore, the question that arises for consideration is, when the President exercises such a power given to his delegate, *viz.*, the Lieutenant-Governor, is it necessary that the Lieutenant-Governor, alone should act or can that business be transacted through the Ministers who form the Cabinet, under section 44 of the Central Act XX of 1963 which business can be allocated by the President under section 46? There is absolutely no difficulty in holding if the acquisition of land is a business of the State Government, the satisfaction of the Government of the Union Territory of Pondicherry, would be sufficient. On the contrary, if it is the business of the Central Government, then only this question arises. It is true when there is a delegation, the Lieutenant-Governor occupies the place of the President. It is also true concerning those powers for what is not delegated, the Union Government can pass orders. Under Article 239 of the Constitution every Union Territory shall be administered by the President. The President in this context means the Union Government. In *Shamsher Singh* v. *State of Punjab*[1], it was laid down in paragraph 25 as follows:

> The executive power of the Union is vested in the President under Article 53 (1). The executive power of the

1. (1968) 1 I.T.J. 466 : (1968) 2 S.C.J. 727: A.I.R. 1968 S.C. 637.
2. (1966) 1 S.C.R. 430 at p. 438 : A.I.R. 1966 S.C. 644 at 648.

1. (1975) 1 S.C.R. 814 : A.I.R. 1974 S.C 2192.

State is vested in the Governor under Article 154 (1). The expression 'Union' and 'State' occur in Articles 53 (1) and 154 (1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in the exercise of the executive power of the Union vested in the President under Article 53 (1) is taken by the Government of India in the name of the President as will appear in Article 77 (1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154 (1) is taken by the Government of the State in the name of the Governor as will appear in Article 166 (1)."

Having regard to that, the President means the Union Government.

19. Again in *Union of India* v. *Sripati Ranjan Biswas*[1], it was held in paragraph 9 as follows:

"In the history of the entire background of the constitutional development of our country, when the Constitution conclusively contemplates a constitutional President it is not permissible nor is it even intended to invest upon the President a different role of a ruling monarch. Any reference to the President under any rule made under the Constitution must needs be to the President as the constitutional head, as envisaged in the Constitution acting with the aid and advice of the Council of Ministers."

This ruling also leads only to the same conclusion. The extent of the executive power of the Union under Article 73 of the Constitution covers all matters with respect to which the Parliament has got power to make laws. Under Article 246 the Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I. I am unable to accept the argument of Mr. V. K. Thiruvenkatachari that this is a case in which because the Legislature of a State has the power to make laws concerning those items enumerated in List III of Schedule VII and further because item 42 of List III states acquisition and requisitioning of property and thereby embraces the Land Acquisition Act, with respect to this matter it is the Council of Ministers which can deal with this matter and their satisfaction under section 4 (1) and under section 6 would be sufficient. If really what is contemplated is an acquisition for the purpose of the Union, it is the Central Government alone that can act. The Union territories being directly administered by the President through the delegate of Lieutenant-Governor, it is his satisfaction that is material. As rightly contended by Mr. K. K. Venugopal, neither section 44 nor section 46 of the Central Act XX of 1963 would be of any assistance to the respondent. Nor again can section 50 be of any help, since that section speaks of the relation of the Administrator and his Ministers to the President.

20. The Rules of Business of the Government of Pondicherry 1963 which were sought to be pressed into service by the respondent cannot enable the State Government to deal with a matter of this kind since they relate only to the business of the State Government.

21. The S.R.O. No. 3165, dated 5th November, 1963 reads as follows:

"In pursuance of clause (1) of Article 239 of the Constitution the President hereby directs that, subject to his control and until further orders the Administrator of the Union territory of Pondicherry shall exercise the powers and discharge the functions of the Central Government under—

(*i*) Land Acquisition Act, 1894 (I of 1894) except those under the provisos to sub-section (*i*) of section 55 and

(*ii*) The Land Acquisition (Companies) Rules, 1965 within the Union Territory."

This undoubtedly would mean that the Administrator is acting on behalf of the President. This is not a matter in which the Administrator is either aided or advised by the local Cabinet. Even assuming the business rules apply, there are no standing orders in rule 46. That rule states as follows:

1. (1976) 1 S.C.R. 268 : (1976) 1 S.C.J. 522.

"The Administrator may, by standing orders in writing, regulate the transaction and disposal of the business relating to his executive functions referred in sub-rule (2) of rule 4:

Provided that the standing orders shall be consistent with the provisions of this Chapter, Chapter V and the instructions issued by the Central Government from time to time:

Provided further that in the exercise of his functions with respect to the property of the Union situated within the Union Territory, the Administrator shall act in consultation with no Council".

A reference to sub-rule (2) of rule 4 makes it clear that excepting the business of the Government in relation to matters in respect of which section 44 of the Central Act XX of 1963, would apply the remaining business has to be transacted in accordance with Chapter IV. There are no standing orders under rule 46 concerning land acquisition. Therefore, the rules of business again do not enable the State Government to deal with this matter.

22. Turning to section 3 (8) (*b*) (iii) of the General Clauses Act, that states in defining the Central Government as the Administrator thereof acting within the scope of the authority given to him under Article 239 of the Constitution. That again only refers to the Administrator. The President of India, while administering the Union Territory of Pondicherry by virtue of Article 239 does not act as the head of the Central Government. It is in this context S.R.O. No. 3165 dated 5th November, 1963 becomes very important to which I have earlier referred to.

23. Lastly, it is necessary for me to note the decision reported in *Ghousia Begum* v. *Union Territory, Pondicherry*,[1] which helps the petitioner a good deal. Though that case related to an acquisition for the Posts and Telegraphs Department for the construction of an auto-exchange which is a purpose of the Union of India, in dealing with the scope and extent of the powers of the Government of Pondicherry, it was held at page 356:—

"The President, acting under Article 239 of the Constitution, cannot therefore delegate the powers and functions of the Central Government under the Land Acquisition Act for the acquisition of the land in question for the purpose of an Auto-Telephone Exchange for the Posts and Telegraphs Department at Pondicherry to the District Governor of Pondicherry, an Administrator appointed under that Article. It would follow that the notification under section 4 (1) of the Land Acquisition Act made for the purpose by the Lieutenant-Governor of Pondicherry and the further proceedings taken by the Government of that Union Territory in pursuance of that notification are not valid".

On a consideration of all the above, I hold that the authority to be satisfied is the Lieutenant-Governor of Pondicherry for the purpose of section 4 (1) and section 6 of the Land Acquisition Act. It has not been shown in this case there was any such satisfaction. On the contrary, it is admitted by the respondent that it is the concerned Minister who was satisfied. Therefore, the proceedings must be held to be illegal.

24. Accordingly W.P. Nos. 6480 and 6481 of 1975 and 43 of 1976 will stand allowed with costs. Counsel's fee, Rs. 250 one set.

Writ Petition No. 688 *of* 1975:—

25. Applying the ratio of my judgment in W.P. No. 6480 of 1975, this writ petition also will stand allowed. However, there will be no order as to costs.

S.J. ——— *Petitions allowed.*

1. A.I.R. 1975 Mad. 345.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Govindan Nair, CJ. and A. Varadarajan, J.*

Raghveera Sons represented by Partner C. H. Hanumantha Reddy and others .. *Appellants**

v.

Mrs. Padmavathi .. *Respondent.*

Civil Procedure Code (V of 1908), Order 37, rule 3—High Court Original Side Rules, Order 7, rule 6 (1)—Suit on promissory note — Promissory note executed by second defendant for and on behalf of 1st defendant firm in which he was a partner—Application for leave to defend by the firm and the other partners —Plea by defendants that the second defendant had no authority to borrow which could bind the firm—Leave refused by Master and the single Judge — Appeal by the firm and the other partners—Leave granted holding that there were triable issues.

The second defendant, a partner of the first defendant firm, had borrowed money on a promissory note from the plaintiff, for and on behalf of the first defendant firm of which defendants 3 to 6 were also said to be partners. The plaintiff filed an under chapter suit in the High Court. The first defendant and defendants 3 to 6 filed an application for leave to defend contending that the second defendant had no authority to borrow and bind the firm. However, the learned Master refused to grant leave. The first defendant and defendants 3 to 6 filed an application before the learned single Judge for grant of leave. This was refused on the ground that the applicants had not produced the partnership-deed to support their contention. Against this order of the learned single Judge, the 1st defendant-firm and defendants 3 to 6 filed this appeal.

Held, whether, the nature of the business carried on by the firm was such that any of the partners had or should have the authority to bind the firm by his individual act was a question of fact which had to be decided on the materials to be made available to the Court. [*Para.* 9.]

The question whether the money borrowed by the second defendant under the promissory note was utilised for the purpose of the firm had to be decided on the evidence to be made available to the Court during the trial. It was not open to the respondent (plaintiff) to request the Court to look into any evidence at the stage of considering the question whether the appellants were entitled to grant of leave to defend the suit before even there could be any trial of the suit. The learned single Judge erred in drawing an inference against the appellants as regards their plea that the reading of the deed of partnership would clearly show that the second defendant was not at all authorised to borrow any amount on behalf of the firm, from the mere fact that the appellants had neither produced the partnership deed nor made any application, even by the date of his order, to receive as additional document the partnership-deed. It was found on the pleadings and the affidavit of the third defendant filed in support of the application, that triable issues arose and that the appellants were entitled to the leave. [*Para.* 13.]

Cases referred to:—

M/s. Mechelec Engineers and Manufacturers v. *M/s. Basic Equipment Corporation,* (1976) 4 S.C.C. 687: 90 L.W. 82 (S.N.): A.I.R. 1976 S. C. 577; *Smt. Kiranmoyee Dassi* v. *Dr. J. Chatterjee,* (1945) 49 Cal.W.N. 246; *Saremal Puramchand* v. *Kapurchand Puramchand,* I.L.R. (1924) 48 Bom. 176; *Reversion Fund and Insurance Company Ltd.* v. *Maison Cosway Ltd.,* (1912) 1 K.B. 364; *S. R. M. A. R. Ramanathan Chettiar* v. *Annamalai Chettiar,* 61 M.L.J. 704: 34 L.W. 654: A. I. R. 1931 Mad. 825; *Santosh Kumar* v. *Bhai Mool Singh,* (1958) S.C.R. 1211: 1958 S.C.J. 434: (1958) 1 M. L. J. (S. C.) 159: (1958) 1 An.W.R. (S.C.) 159: A.I.R. 1958 S. C. 321; *Kesavan* v. *South Indian Bank Ltd,* I.L.R. (1950) Mad. 251:

*O.S.A. No.50 of 1977.

5th September, 1977.

62 L.W. 465: (1949) 2 M.L.J. 70: A. I. R. 1950 Mad. 226; *Sundaram Chettiar* v. *Valliammal,* (1935) I.L.R. 58 Mad. 116: 68 M.L.J. 16; *Milkhiram (India) (P.), Ltd.* v. *Chamanlal Bros.,* (1966) 68 Bom. L. R. 36: (1966) 2 S.C.J. 606: A.I.R. 1965 S.C. 1698.

Appeal under clause 15 of the Letters Patent and Order 36, rule 1 of the Original Side Rules against the Judgment of the V. Ramaswami, J., dated 28th April, 1977 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application No. 1176 of 1977 in C.S. No. 152 of 1976.

I. Subramaniam and *K. C. Ramamurthy,* for Appellants.

V. R. Biksheswaran and *K. Ragunathan,* for Respondent.

The Judgment of the Court was delivered by

Varadarajan, J.—This appeal is against the order of V. Ramaswami, J., dismissing Application No. 1176 of 1977 which had been filed for setting aside the Master's Order dated 7th February, 1977 made in Application No. 3826 of 1976 in C.S. No. 152 of 1976.

2. C.S. No. 152 of 1976 had been filed for recovery of a sum of Rs. 50,000 with subsequent interest at 12 per cent. per annum, from the date of the plaint on the basis of the promissory note dated 27th July, 1973, alleged to have been executed by S. R. Swami, the second defendant, a partner of the first defendant-firm, for and on behalf of the first defendant-firm of which defendants 3 to 6 also are said to be partners. It was alleged in the plaint that defendants 1 and 3 to 6 (the appellants) are not only well aware of the lending of the amount by the respondent (plaintiff) but were also promising to pay the amount due under the promissory note before they changed their attitude later and chose to make all sorts of false and frivolous allegations. The suit was filed as an under chapter suit under the provisions of Order 7, rule 1 of the Original Side Rules of this Court.

3. The appellants filed Application No. 2825 of 1976 before the Master under Order 37, rule 3 (2), Civil Procedure Code and under Order 7, rule 6 (1) of the Original Side Rules, of this Court, for leave to defend the suit. The allegation made in the third defendant's affidavit filed in support of the application for grant of leave was that though the second defendant 'was in charge of the effective running of the affairs of the firm, 'and looking' after the affairs of the firm, he was never empowered either explicitly or impliedly to borrow any amount singly and bind the firm for the unauthorised borrowing'. The further allegations made in that affidavit are:—

> "A reading of the Deed of Partnership clearly shows that he was not at all authorised to borrow any amounts on behalf of the firm. Suffice it to say, the firm or the defendants 3 to 6 are not liable for the alleged borrowing by the second defendant from the plaintiff. If at all the second defendant had borrowed any amount from the plaintiff it could only be in his individual capacity and hence cannot bind the firm or the defendants 3 to 6. I further submit that I have reasons to believe that the consideration for the alleged borrowing was not utilised for the benefit of the firm and I have reasons to believe that the consideration, if at all any, received by the second defendant from the plaintiff, was appropriated by the second defendant".

4. The respondent opposed the application for grant of leave to defend, contending *inter alia* that she was not aware of the recitals in the partnership deed and was not, in any event, concerned with the same 'as the amount borrowed under the suit promissory note was utilised by the first defendant-firm for its own benefit and in any event the same was ratified by the first defendant-firm by issuing account payee cheques towards payment of interest".

5. The Master took note of the allegation made in the reply notice dated 17th May, 1976 sent by the appellants that the second defendant had misused his

position both as a partner and as a power-of-attorney agent and executed a number of promissory notes in favour of third parties, purporting to do so for and on behalf of the first defendant-firm. He observed that there was no whisper in that reply notice that the second defendant was not authorised explicitly or impliedly to borrow any amount for and on behalf of the firm and that the contention that the second defendant had no implied authority to borrow any amount for and on behalf of the firm had been trotted out only in the application for grant of leave, and he dismissed the application holding that no triable issue arises.

6. The appellants took the matter before V. Ramaswami, J., on appeal in Application No. 1176 of 1977. The learned Judge dismissed the application observing:—

"The contention of the applicants was that the second defendant was not empowered expressly or impliedly to borrow any money on behalf of the firm. The applicants did not produce any partnership deed before the Master showing any restriction on the authority of the second defendant in borrowing money. As a partner the second defendant is entitled to borrow money on behalf of the firm and that is authorised under the provisions of the Partnership Act. The only provision which the learned counsel for the applicants would rely on in support of his contention that the second defendant had no authority to borrow under the Partnership Act is section 19 (2) (*e*) of the Act. Under that provision it is stated that, in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to admit any liability in a suit or proceeding against the firm. I am wholly at a loss to find what this clause has to do with the defence taken by the applicants. The plaintiff is not suing the firm on the basis of any admission of liability by the second defendant. The suit is filed on the basis of the promissory note executed by the second defendant on behalf of the firm. The second defendant, as already stated, is entitled to execute a promissory note unless there is a prohibition with regard to his power in the deed of partnership. As already stated, the applicant did not produce the document. Nor any application is filed even on this day to receive additional documents any partnership deed, if there is one".

7. Order 7, of the Original Side Rules of this Court relates to special procedure in respect of certain suits. In any case in which the plaint and summons are in the form prescribed in that Order, the defendant shall not defend the suit unless he obtains leave to defend the suit from the Master as provided in rule 5 of the Order. Under rule 6 (1) an application for leave to defend the suit has to be made to the Master, supported by such evidence by way of affidavit as the defendant desires to place before the Court. Order 37, Civil Procedure Code provided summary procedure for the disposal of certain class of cases. Rule 3 of that Order lays down that in a suit to which that Order applies, the plaintiff should, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader. Sub-rule (5) of rule 3 lays down that the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or the Judge to be just. The proviso to that sub-rule lays down that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

8. If the defendant does not appear on proof of service of summons on him, or the leave to defend is not granted, a decree for the amount with costs has to be passed in favour of the plaintiff under rule 3 of Order 7 of the Original Side Rules.

9. In law, every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incidental to the business of the firm, although his name does not appear on the face of the instrument and although he be a sleeping or a secret partner. In order to take a case out of this principle of a general law, it must be shown that the holder of the bill knew, at the time he received it, that the transaction was the private affair of a single person. In the case of partnerships which are not of a mercantile character, namely, non-trading firms, there is no implied authority of a partner to bind the firm by his individual act. The partnership in this case had been constituted for the purpose of carrying on business as engineering contractors and is different from a commercial or a trading firm. Therefore, we are of the opinion that the observation of V. Ramaswami, J., in the order under appeal that as a partner the second defendant was entitled to borrow money on behalf of the firm and that he is authorised under the provisions of the Partnership Act so to do and that he is entitled to execute a promissory note unless there is a prohibition in regard to his power in the deed of partnership, is too wide. No doubt, section 19 (1) of the Partnership Act lays down that subject to the provisions of section 22 of that Act, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. This authority of a partner to bind the firm conferred by that section is called his implied authority. We find the following passages in 'Lindley on Partnership' 13th Edition, pages 168 to 170:—

"Every member of an ordinary trading partnership had implied power to bind the firm by drawing, accepting or endorsing bills of exchange, or by making and endorsing promissory notes in its name and for the purpose of the firm in the ordinary course of business, but not otherwise...... With respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his co-partners by putting the name of the firm to a negotiable instrument,, depends upon the nature of the business of the partnership. In the absence of evidence showing usage, the power had been denied to one of several mining adventurers, quarry workers, farmers, solicitors, and auctioneers ...... If, however, a member of a non-mercantile firm concurs in drawing or authorises his partner to draw, a bill in the name of the firm, he impliedly authorises its endorsement in the same name for the purpose for which it was drawn".

As already stated, the partnership in the present case had been constituted for carrying on business as engineering contractors. Whether the nature of the business carried on by the firm is such that any of the partners has or should have the authority to bind the firm by his individual act is a question of fact which has to be decided on the materials to be made available to the Court.

10. The learned counsel for the respondent invited our attention to the decision of the Supreme Court in *M/s. Mechelec Engineers and Manufacturers* v. *M/s. Basic Equipment Corporation*[1], where the principles applicable to cases covered by Order 7, Civil Procedure Code as stated by Das, J., in *Smt. Kiranmoyee Dassi* v. *Dr. J. Chatterjee*[2], have been extracted. They are:—

"(*a*) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment

1. (1976) 4 S.C.C. 687 · 90 L.W. 82 (S.N.): A.I.R. 1977 S.C. 577.
2. (1945) 49 Cal.W.N. 246, 253.

and the defendant is entitled to unconditional leave to defend.

(*b*) If the defendant raises a triable issue indicating that he has a fair or *bona fide* or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(*c*) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(*d*) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(*e*) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

11. The learned counsel for the respondent relied upon the decision in *Saremal Puramchand* v. *Kapurchand Puramchand*[1] in which the defendants 1 and 2 had entered into a partnership for carrying on the business of buying and selling copper and brass utensils in March, 1930. On 23rd May, 1930, defendant 1 borrowed Rs. 6,000 from the plaintiff on promissory note passed by him in the name of the firm for purposes of the business. The partnership came to an end on the 28th of that month and in April, 1923, the plaintiff sued both the defendants on the promissory notes. It has been held that the partnership in question having been one of a commercial nature, defendant 1 had an implied authority to borrow money for the firm, and that, therefore, defendant 2 was also liable for the loan. The firm in that case was a trading firm. The other decision relied upon by the learned counsel for the respondents is of the Court of Appeal in *Reversion Fund and Insurance Company, Ltd.* v. *Maison Cosway Ltd.*[1] In that case the Managing Director of the defendant company had been prohibited by the terms of his appointment from borrowing money on behalf of the company, unless specially authorised to do so by the company. However, he borrowed money on behalf of the company from the plaintiff company without authority from the defendant company. But the money was applied by him in discharging existing legal debts of the defendant-company. The plaintiff company knew through its officers, when the advance was made, that the Managing Director of the company had no authority to borrow on its behalf. However, it has been held by Buckley, L.J. and Kennedy, L.J., Vaugham Williams, L. J., dissenting that the plaintiff-company was entitled to recover from the defendant-company the amount borrowed, notwithstanding its knowledge as before mentioned. The appellants have alleged in the third defendant's affidavit filed in support of the application for grant of leave that the consideration for the alleged borrowing by the second defendant was not utilised for the benefit of the firm. No doubt the respondent had contended in the counter affidavit of the son that the amount borrowed under under the suit promissory note was utilised by the first defendant firm for its own benefits, and in any event, it was ratified by the first defendant-firm by issuing account payee cheques towards

1. (1924) I.L.R. 48 Bom. 176.

1. (1912) 1 K.B. 364.

payment of interest. Therefore, the question whether the money borrowed by the second defendant under the promissory note was utilised for the purpose of the firm had to be decided on the evidence to be made available to the Court during the trial. In these circumstances, we are of the opinion that the aforesaid two decisions relied upon by the learned counsel for the respondents do not help the respondent.

12. The other decision relied upon by the learned counsel for the respondent is of Curgenven, J. in *S. R. M. A. R. Ramanathan Chettiar* v. *Annamalai Chettiar*[1], where the learned Judge has observed:

> 'The only reasonable way of reading Order 7, rule 14 with Order 11, rule 15, is to hold that the expression 'referred to' is equivalent to 'entered in the list'. It seems to me that for this purpose the list must be deemed to be part of the plaint, as for instance would be a schedule of property."

While conceding that this contention is not that any evidence must be taken into consideration for deciding the question whether the appellants are entitled to grant of leave, the learned counsel for the respondents sought to rely upon the notice and reply notice exchanged between the parties to substantiate his contention that money borrowed had been utilised for the business of the firm. We are of the opinion that it is not open to the respondent to request the Court at this stage to look into any evidence at the stage of considering the question whether the appellants are entitled to grant of leave to defend the suit. The Supreme Court has observed in *Santosh Kumar* v. *Bhai Mool Singh*[2] thus—

> "It is always undesirable, and indeed impossible to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan* v. *South Indian Bank Ltd.*[1], and is examined in greater detail in *Sundaram Chettiar* v. *Valliammal*[2], to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible defence on those facts. . . . .
>
> Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods, which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made and gave the numbers of the cheques. This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said 'In

1. 34 L.W. 654 : 61 M.L.J. 704 : A.I.R. 1931 Mad. 825.
2. 1958 S.C.J. 434 : (1958) 1 M.L.J. (S.C.) 159 : (1958) 1 An.W.R. (S.C.) 159 : (1958) S.C.R. 1211 : A.I.R. 1958 S.C. 321.

1. I.L.R. (1950) Mad. 251 : 62 L.W. 465: (1949) 2 M.L.J. 70 : A.I.R. 1950 Mad. 226.
2. (1935) I.L.R. 58 Mad. 116 : 65 M.L.J. 16.

the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions......" This is surprising conclusion. The facts given in the affidavit are clear and precise, the defence could barely have been clear. We find it difficult to see how a defence that on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether *'if the facts alleged by the defendant are duly proved'* they will afford a good, or even a plausible, answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains".

Even in the subsequent decision of the Supreme Court in *Milkhiram (India) Private Ltd.* v. *Chamanlal Bros.*[1], where reference has been made to the earlier decision in *Santhosh Kumar* v. *Bhai Mool Singh*[2], the Supreme Court has observed:—

"The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendent must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raise a triable issue are not has been ascertained by the Court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage".

13. In these circumstances, we do not agree with the learned counsel for the respondent that the notices which passed between the parties and had been produced by the respondent along with the plaint, should be looked into to ascertain whether the defence raised is *bona fide*. For the same reason we think, that V. Ramaswami, J., erred in drawing inference against the appellants as regards their plea that reading of the deed of partnership will clearly show that the second defendant was not at all authorised to borrow any amount on behalf of the firm from the mere fact that the appellants have neither produced the partnership deed nor made any application, even by the date of his order, to receive as additional document any partnership deed. We find on the pleadings and the affidavit of the third defendant filed in support of the application, that triable issues arise and that the appellants are entitled to the leave.

14. The appeal is accordingly allowed with costs and the leave is granted. The sum of Rs. 15,000 directed to be deposited into Court by the appellants by 7th September, 1977, will continue to be in deposit and will abide the result of the suit.

S.J. ——— *Appeal allowed.*

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1. (1966) 68 B.L.R. 36 : (1966) 2 S.C.J. 606: A.I.R. 1965 S.C. 1968.
2. 1958 S.C.J. 434 : 1958 S.C.R. 1211 : A.I.R. 1958 S.C. 321.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail and V. Sethuraman, JJ.*

The State of Tamil Nadu represented by the Deputy Commissioner (C.T.) Madras Division Kuralagam, Madras-1 ... *Appellant**

v.

M/s. Saraswathy Kurwath Damodaran, legal heir of Kurwath Damodaran Propretrix, Cochin Fish Canning Company, Anangath Road, Cochin-16 *Respondent.*

Tamil Nadu General Sales Tax Act (1 of 1959) section 2 (d)—Dealer in Sea Food Export Import licence given under export promotion scheme—Import of paper and paper boards—Sale of the paper and paper boards whether exigible to tax—Import directly connected with export of sea food—Intention of import was sale—Sale liable to tax.

The predecessor-in-interest of the respondent herein was dealing in sea foods in Kerala. Under the export promotion scheme, he obtained a licence for import of paper and paper boards in respect of the export of sea foods made by him. He utilised that licence by importing paper and paper boards and sold the same to a party in Madras. The turnover was Rs. 49,358.57 and sales tax was assessed thereon. The dealer preferred an appeal to the Appellate Assistant Commissioner which was dismissed. On further appeal to the Tribunal, the Tribunal held that the dealer could not have had the intention of dealing in paper and paper boards, that the transaction in question was not a sale in the course of business and that the transaction was not liable to tax. This view of the Tribunal was challenged by the State in this revision.

Held, In this case, the import licence obtained by the dealer was a direct result of export of sea food and the sale of paper and paper boards so imported was thus intimately connected with his business in sea food. The Tribunal was certainly wrong in stating that the late dealer being a dealer in sea foods could not have any intention to carry on business in paper and paper boards. As a matter of fact, the paper and paper boards imported by him could not have been used as a raw material in any other business activity he was carrying on and consequently even at the time when he imported the paper and paper boards against the import licence he did so with the intention of selling the paper and paper boards so imported. Having regard to the fact that the import of paper and paper boards was directly referable to and as a matter of fact was dependent upon, the export of sea foods in which the late dealer was dealing the sale of paper and paper boards was a transaction in connection with or incidental or ancillary to the business in sea foods which the late dealer was carrying on. [*Para.* 2.]

The tax revision petition was allowed and the order of the Tribunal was set aside. [*Para.* 3.]

Cases referred to:

State of Tamil Nadu v. *Burmah Shell Co. Ltd.*, (1973) 31 S.T.C. 426: (1973) 3 S.C.C. 511: A.I.R. 1973 S.C. 1045; *District Controller of States* v. *A.C. Taxation Officer,* (1976) 37 S.T.C. 423; (1976) Tax.L.R. 1453: (1976) 1 S.C.C. 660: A.I.R. 1976 S.C. 489.

Petition under section 38 of the Act I of 1959 praying the High Court to revise the Order of the Court of the Sales Tax Appellate Tribunal (Main Bench) Madras dated 19th April, 1971 and passed in T.A.No. 1224 of 1969 (Appeal) No. 385 of 1969 —Appellate Assistant Commissioner (Commercial Taxes) I, Madras City, Rc. 1409 of 1968 A-3 dated 22nd July, 1968 M.G.S.T. 65-66—Assistant Commercial Tax Officer, Harbour-I.

K.S. Bakthavatsalam, Additional Government Pleader on behalf of Petitioner.

K. Ramgopal, for Respondent.

* T.C.No. 24 of 1972 (Revision No. 12 of 1972) *19th September,* 1976.

The Judgment of the Court was delivered by

Ismail, J.—The State of Tamil Nadu has preferred this Tax Revision Petition under section 38 of the Tamil Nadu Act (I of 1959) against the order of the Sales Tax Appellate Tribunal dated 19th January, 1971. The predecessor-in-interest of the respondent herein was dealing in sea foods in Kerala. Under the export promotion scheme he obtained an import licence for import of paper and paper boards in respect of the export of sea foods made by him. He utilised that licence by importing paper and paper boards and sold the same to Basanth Paper House, Madras. The turnover with reference to this transaction was Rs. 49,358.57 and sales tax was assessed at 2½ per cent. thereof. The dealer preferred an appeal to the Appellate Assistant Commissioner and the Appellate Assistant Commissioner dismissed the appeal. When the respondents preferred a further appeal to the Sales Tax Appellate Tribunal, the Tribunal allowed the appeal. The Tribunal held that the late Kurwath Damodaran being a dealer in sea food cannot have any intentions to carry on busines in paper and paper boards and he had to sell such goods as he obtained under import licence and that being a solitary transaction and as Kurwath Damodaran was not a dealer in paper and paper boards, the transaction in question cannot be stated to be a sale in the course of business of Kurwath Damodaran, and under those circumstances the transaction not being a sale in the course of business was not taxable under the Act. It is the correctness of this decision of the Tribunal that is challenged by the State.

2. A perusal of the order of the Tribunal shows that on behalf of the respondent only three points were urged before the Tribunal. One was that the sale in question is in the course of import and hence not liable to sales tax under the Tamil Nadu General Sales Tax Act, 1959. The second was that the sale in question was an outside State sale and therefore not liable to tax under the Tamil Nadu Act. The third was that the assessee was not a dealer in paper and it is an isolated transaction and so it cannot be considered as sale in the course of his business. The Tribunal held against the dealer on the first two grounds and only with regard to the third ground it accepted the case of the respondent. Consequently, the question that arises for consideration in this tax revision petition is whether the conclusion of the Tribunal on the third point urged on behalf of the respondent is correct or not. This in turn will depend upon the definition of the term 'dealer and 'business' under the Tamil Nadu Act. Section 2 (*d*) defines the expression 'business' as follows :

> "2 (*d*) 'business' includes :..........
>
> (i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and
>
> (ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern."

The term 'dealer' is defined in section 2 (*g*) as follows:

> " 'dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes:—
>
> (*i*) a local authority, company or Hindu undivided family, which carries on such business;
>
> (*ii*) a casual trader;
>
> (*iii*) a commission agent, a broker or a *del credere* agent, or an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supply-

ing or distributing goods on behalf of any principal;

(*iv*) every local branch of a firm or company situated outside the State.

Explanation (1): A society (including a co-operative society) club or firm or an association which, whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act:

Explanation (2): The Central Government or any State Government which whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act."

It may be seen that this definition of the term 'business' introduced into the Act by an amendment of 1964 is very wide. The first part of the definition of the term 'business' refers to any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. But the second part of this definition refers to any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern, the word 'such' referring back to the trade, commerce or manufacture or any adventure or concern mentioned in the first part. In this case, the import licence obtained by the dealer was a direct result of export of sea food and the sale of paper and paper boards so imported was thus intimately connected with his business in sea food. The Tribunal was certainly wrong in stating that the late Kurwath Damodaran being a dealer in sea foods cannot have any intention to carry on business in paper and paper boards. As a matter of fact, the paper and paper boards imported by him could not have been used as a raw material in any other business activity he was carrying on and consequently even at the time when he imported the paper and paper boards against the import licence he did so with the intention of selling the paper and paper boards so imported. Consequently, there can be no doubt whatever that he intended to sell paper and paper boards imported against the import licence. The only other question that arises for consideration is whether this transaction *viz.*, the sale of imported paper and paper boards to Basanth Paper House, Madras can be said to be a transaction connected with or incidental or ancillary to the trade, commerce manufacture, adventure or concern mentioned in the first part of the definition and in this case the business in sea foods which the late Kurwath Damodaran was admittedly carrying on. We are clearly of the opinion that having regard to the fact that the import of paper and paper boards is directly referable to and as a matter of fact was dependent upon, the export of sea food in which the late Kurwath Damodaran was dealing the sale of paper and paper boards was a transaction in connection with or incidental or ancillary to the business in sea foods which the late Kurwath Damodaran was carrying on. This view of ours derives support from the decision of the Supreme Court in *The State of Tamil Nadu* v. *Burmah Shell Co. Ltd.*[1], and in *District Controller of Stores* v. *A.C. Taxation Officer*[2],

3. The learned counsel for the respondent contended before us that the definition of the term 'total turnover' occurring in section 2 (*g*) of the Tamil Nadu Act requires a person to have a place of business in the State for attracting the liability to tax and in this case the late Kurwath Damodaran did not have a place of business in the State when he sold the paper and paper boards in Tamil Nadu State and consequently he cannot be held liable to sales tax on the turnover relating to the sale of paper and paper boards in the State. It is not necessary for us to consider the correctness or otherwise of this contention because such a contention was

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1. (1973) 3 S.C.C. 511 : (1973) 31 S.T.C. 426: A.I.R. 1973 S.C. 1045.

2. (1976) 37 S.T.C. 423 : (1976) Tax L.R. 1453 : (1976) S.C.C. 660: A.I.R. 1976 S.C. 489.

not advanced before the Tribunal and the Tribunal therefore had no occasion to consider the same. It is not as if the question is a pure question of law because this will involve an investigation into as to whether the late Kurwath Damodaran had a place of business in Tamil Nadu State or not. Under these circumstances, the tax revision petition is allowed and the order of the Tribunal is set aside and the assessment on the turnover of Rs. 49,358.75 at 2½ per cent. made by the Assessing Authority as confirmed by the Appellate Authority is restored. There will be no order as to costs.

S.J. — Petition allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*G. Ramanujam, J.*

Chand Basha .. *Appellant**

v.

Pyari Bi .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 30—Suit for eviction of tenant decreed—Four months' time granted to vacate—Decree put in execution—Act amended—Building in question falling within the purview of Amended Act—Effect—Maintainability of execution petition in the Civil Court.

When a decree for eviction was passed by the trial Court in this case, the Rent Control Act did not apply to the building in question. But, by the time the decree passed in that suit could be executed, the Rent Control Act came to be applied to the building in question as a result of the Amending Act XXIII of 1973. Therefore the executing Court is under a duty to apply the provision of the statute which came into force, and it cannot overlook the specific prohibition contained in section 10 of that Act stating that no tenant shall be evicted either in pursuance of a decree or otherwise, except under the provisions of the Rent Control Act. Therefore even though the decree passed in the suit is valid and its validity is not affected by the provisions of the Amending Act, it ceased to be executable so long as the Rent Control Act is applicable to the building in question. [*Para.* 7.]

The decree passed in the civil suit for eviction, even though valid is not executable so long as the provisions of the Rent Control Act continue to apply to the building. [*Para.* 8.]

Cases referred to:—

Thalai Vadivu Anandar v. *Venugopala Chettiar*, (1960) 1 M.L.J. 356: (1960) M.W.N. 685; *Killick Nixon Ltd.* v. *V.B. Narayana Rao*, (1974) 1 M.L.J. 16 (S.N.)

Appeal against the order of the IV Additional Judge, City Civil Court, Madras dated 8th July, 1975 and made in C.M.A.No. 229 of 1974 (E.A.No.2101 of 1974 in E.P.No. 622 of 1974 in O.S.No. 7420 of 1971, X Assistant Judge, City Civil Court at Madras).

R. Srinivasan, for Appellant.

S. M. Abdul Wahab, for Respondent.

The Court made the following

ORDER.—The respondent herein obtained a decree dated 12th April, 1973 for eviction of the appellant herein O.S. No.7420 of 1971 on the file of the City Civil Court, Madras. The decree granted the appellant four months' time to vacate. On 5th August, 1974 the said decree was put into execution in E.P.No. 622 of 1974. By that time section 30 of the Tamil Nadu Buildings (Lease and Rent Control) Act hereinafter referred to as the main Act was amended by Act XXIII of 1973. As a result of the said amendment, the building in respect of which the decree for eviction was obtained by the respondent in the said suit came within the purview of the main Act. Taking advantage of that situation, the appellant contended before the executing Court that the decree for eviction cannot be executed after the coming into force of the Amending Act. This

*A.A.A. No. 124 of 1975.

10th September, 1976.

objection was, however, rejected by the executing Court, and the execution proceedings were allowed to go on.

2. On appeal, the lower Appellate Court also agreed with the view of the executing Court and held that under the decree for eviction passed earlier to the coming into force of the amending Act, the respondent decree-holder had acquired a vested right, that such vested rights cannot be taken away except by giving retrospective effect to the amending Act, and that therefore the decree-holder is entitled to execute the decree for eviction notwithstanding the amending Act. The view taken by both the Courts below has been challenged in this appeal by the tenant-appellant.

3. According to the learned counsel for the appellant the Courts below have not properly appreciated the contention put forward by him. He states that it is not his case that the amending Act is retrospective in character so as to unsettle or take away any vested right. His contention before the Courts below was that in view of the amending Act the provisions of the main Act will apply to the building in respect of which the decree for eviction has been obtained by the respondent, and that as such the executing Court cannot execute the decree for eviction in the face of section 10 of the main Act which specifically says that a tenant shall not be evicted whether in execution of the decree or otherwise, except in accordance with the sections 14 to 16 of the Act. According to the learned counsel it is not necessary for him to question the validity of the decree on the ground that the amending Act is retrospective in character, and it is enough for him to show that notwithstanding the validity of the decree it cannot be put into execution in view of section 10 of the principal Act. The learned counsel for the appellant relies on a Bench decision of this Court in *Thalai Vadivu Anandar* v. *Venugopala Chettiar*[1], in support of his contention that the decree in this case cannot be executed after the coming into force of the amending Act.

1. (1960) 1 M.L.J. 356: 1960) M.W.N. 685.

4. A perusal of the judgment of the Courts below indicate that they have come on a wrong track as pointed out by the learned counsel for the appellant. We are not concerned in this case as to whether the amending Act can unsettle or disturb vested rights. The point urged by the learned counsel for the appellant is that by virtue of section 10 of the Rent Control Act, the executing court cannot evict the tenant in pursuance of the decree obtained by the respondent and that the remedy of the decreeholder is only to proceed to evict the tenant under the provisions of the Rent Control Act. His contention is not that the decree has become a nullity as a result of the retrospective operation of the amending Act. Therefore, the only question that is to be considered in these proceedings is to see whether the executing Court is powerless to execute the decree for eviction in view of section 10 of the Act.

5. It is true, the respondent has obtained a decree for eviction against the appellant in O.S. No. 7420 of 1971, and the four months period given to the appellant to vacate had expired, and as such he is entitled to put the decree into execution. In this case the execution petition was filed on 5th March, 1974. But however, even on 30th June, 1973 the amending Act XXIII of 1973 had come into force as a result of which section 30 of the principal Act came to be amended. The result of the amendment is that the buildings constructed more than five years before would be governed by the provisions of the main Act. As a result of the change in the statutory provisions, the building in respect of which the decree for eviction has been obtained earlier by the respondent has come to be governed by the provisions of the Act for the first time. The question is whether the change brought about in the statute has affected the powers of the executing Court in view of section 10 which applied to the building with effect from 30th June, 1973, the date of the amendment of section 30.

6. The execution petition was filed on 5th March, 1974 and on that date the

provisions of the Act applied to the building in question. Section 10 prohibited the eviction of tenants in execution of decrees or otherwise, except by invoking the procedure for eviction laid down under the provisions of the Rent Control Act. The executing Court cannot ignore a statutory provision which prohibits eviction of a tenant except in certain stated circumstances and proceed to execute the decree as if there is no restraint on its power. I am, inclined to agree with the contention of the learned counsel that in view of section 10 of the Act which applies to the building with effect from 30th June, 1973, the executing Court is powerless to execute the decree for eviction obtained earlier by the respondent.

7. This view of mine finds support from the decision of a Division Bench of this Court in *Thalai Vadivu Anandar* v. *Venugopala Chettiar*[1], which is directly in point. In that case a suit had been filed for recovery of possession of certain property with past and future rents against the person in occupation. As a result of a compromise in that suit, there was a decree directing the defendant to deliver possession of the property on a particular day. As the defendant failed to deliver possession by the prescribed date, the plaintiff sought execution of the decree for delivery of possession and delivery was also ordered by 10th of June, 1954 by the executing Court. The defendant at that stage filed an application for stay of the execution of the order on the ground that the Rent Control Act had since been extended to the village in which the property was situate on and from 16th of June, 1954, and that therefore, the decree-holder cannot evict him. The executing Court overruled that objection and directed delivery. Against that order the tenant appealed but without success. There was a Civil Miscellaneous Second Appeal to this Court which was allowed by Panchapakesa Ayyar, J. The learned Judge after an elaborate discussion of the several decisions cited before him held that section 7 of the Rent Control Act which become applicable to the building from 16th June, 1964 was a complete answer to the claim of the decree-holder for eviction of the tenant. The decision of Panchapakesa Ayyar, J., was questioned in a letters patent appeal. Rajamannar, CJ., speaking for the Division Bench, has taken the view that as by the time of filing the execution petition the Rent Control Act had been extended to the village in which the property was situated, the executing Court was bound to apply the provisions of the Act and that any eviction even in the pending execution petition will be contrary to section 7. The decision in that case squarely applies to the facts of this case. When the decree for eviction was passed by the trial Court in this case, the Rent Control Act did not apply to the building in question. But by the time the decree passed in that suit could be executed, the Rent Control Act came to be applied to the building in question as a result of the amending Act XXIII of 1973. Therefore, the executing Court is under a duty to apply the provisions of the statute which have come into force; and it cannot overlook the specific prohibition contained in section 10 of that Act which says that no tenant shall be evicted either in pursuance of a decree or otherwise, except under the provisions of the Rent Control Act. Therefore, even though the decree passed in the suit is valid and its validity is not affected by the provisions of the amending Act, it has ceased to be executable so long as the Rent Control Act is applicable to the building in question.

8. The learned counsel for the respondent would however rely on a decision of a Division Bench of this Court in A.S.No. 518 of 1973 reported in *Killick Nixon Ltd.* v. *V. B. Narayana Rao*[1]. in support of his contention that as the provisions of the amending Act are not retrospective, the executability of the decree passed earlier cannot be questioned. In that case there was a suit in ejectment after temination of the tenancy in respect of a building in Madras City, as the building, having been constructed after 1960, stood exempted under the provisions of section 30 of the Rent Con-

1. (1960) 1 M.L.J. 356: (1960) M.W.N. 685.

1. (1974) 1 M.L.J. 16 (S.N.)

trol Act. The Court passed a decree for possession. The matter was taken on appeal to this Court. When the appeal was pending section 30 of the Rent Control Act was amended so as to withdraw the exemption granted in respect of buildings constructed before a particular date. The result was the exemption under section 30 of that Act was not available in respect of the building. At the stage of the appeal it was urged by the tenant that in view of the withdrawal of the exemption under section 30, the building is governed by the provisions of the Rent Control Act, and therefore, the decree in ejectment passed by the trial Court has to be set aside by the appellate Court. This Court considered the scope of the amending Act XXIII of 1973 which came into force on 30th June, 1973 and held that the amending Act has no retrospective effect and therefore it cannot take away the rights which have already accrued to the parties as a result of orders in proceedings initiated earlier to the coming into force of the amending Act, that as the amending Act does not indicate as to what is to happen to the decisions of civil Courts rendered prior to the amendment, it should be taken that it does not affect the pending proceedings or the decisions rendered therein. In that view the Court held that the decree in ejectment passed against the tenant had not been invalidated by the amending Act, and therefore, the appellate Court was at liberty to dispose of the appeal on merits, leaving the question of executability of the decree to be considered at the esxecution stage. A perusal of the said judgment shows that the Court felt that it was unnecessary at that stage to go into the question of executability of any decree that may be passed, that the validity of a decree is one thing, and that its executability is another, and that the Court in passing a decree is not concerned with its executability. I do not see how the said decision will help the respondent in this case. In that case the contention urged by the tenant was that after coming into force of the amending Act which withdrew the exemption granted to the building under section 30 of the Act no decree in ejectment could be passed by a civil Court. This contention has been rejected by the Division Bench on the ground that as the amending Act does not touch or affect the proceedings that might have been initiated earlier in the civil Court, it cannot be taken that all the earlier decrees can be said to be nullified by the amending Act, and that the question of executability has to be decided at the stage of execution with reference to the provisions of the amending Act. In that case, the attack against the decree based on the provisions of the amending Act was held unsustainable, without going into the question of the executability of the decree. Such a question has been decidedas already stated, specifically in *Thalai Vadivu Anandan* v. *Venugopala Chettiar*[1]. I have to therefore allow this appeal holding that the decree passed in O.S.No. 7420 of 1971, even though valid, is not executable so long as the provisions of the Rent Control Act continue to apply to the building. There will be no order as to costs. No leave.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

Chinnathayi and others .. *Appellants**

v.

Narayanaswami Kounder and others .. *Respondents.*

Hindu Marriage Act (XXV of 1955), sections 15 and 16 as amended by the Marriage Laws (Amendment) Act (LXVIII of 1976)—Suit for declaration of title to property—Remarriage within two months of dissolution of first marriage—Children born of remarriage—Remarriage whether legal and children whether entitled to succeed to their father's property—Effect of amendment of sections 15 and 16 by the Marriage Laws (Amendment) Act of 1976.

C married one *N* and this marriage was dissolved on an application made by *C* before the civil Court. Subsequently, within two months from the dissolution of the marriage, *C* married *R* and gave

1. (1960) 1 M.L.J. 356: (1960) M.W.N. 685.
*S.A. No. 1641 of 1974. 7*th February*, 1977.

birth to a daughter and a son. *R* died on 6th October, 1969 leaving behind the suit properties. On the death of *R*, his brother contended that the marriage of *C* with *R* was not in accordance with the Hindu Marriage Act and therefore not valid and neither the daughter nor the son was entitled to succeed to the properties of *R*. *C* along with her children filed the suit for declaration. The trial Court dismissed the suit and this was confirmed by the lower appellate Court on the ground that the marriage between *R* and *C* was void as having been contracted within one year from the date of the decree which dissolved the earlier marriage. *C* with her children filed this second appeal.

Held: Under section 39 of the Marriage Laws (Amendment) Act (LXVIII of 1976), all petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the Amending Act shall be dealt with and decided by such Court, if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act as amended by the Act of 1976. [*Para.* 2.]

The issue relating to the validity of marriage in the instant case will have to be decided only with reference to the provision of the Hindu Marriage Act as it is a "proceeding in causes and matters matrimonial". [*Para.* 2.]

The amendment of section 15 of the Hindu Marriage Act by reason of section 39 of the Act LXVIII of 1976 had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and those pending proceedings are to be decided only as per the amended provisions. If that is so, section 15 of the Hindu Marriage Act will have to be read as if there is no proviso. [*Para.* 2.]

Since there was a dissolution of the marriage and the first plaintiff married the deceased *R* only after the dissolution of the marriage, though within a period of one year from the date of dissolution, the marriage was legal and valid. The first plaintiff as the legally married wife, and plaintiffs 2 and 3 as the legitimate children of *R*, were therefore entitled to inherit the property of *R* on his death. The plaintiffs were, therefore, entitled to the decree as prayed for. [*Para.* 2.]

Case referred to:

Chandra Mohini v. *Avinash Prasad*, (1967) 1 S.C.R. 864 : (1967) 1 S.C.J. 42 : A.I.R. 1967 S.C. 581.

Appeal against the decree dated 8th July, 1974 of the Court of the Subordinate Judge, Cuddalore in Appeal Suit No. 25 of 1972, preferred against the decree of the Court of the District Munsif, Cuddalore in Original Suit No. 1184 of 1969.

K. Sarvabhauman and *K. Sampath*, for Appellant.

M. N. Sundararajan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. The first plaintiff is the widow of one Ramasami, who died on 6th October, 1969. The second and third plaintiffs are the daughter and son of the first plaintiff by Ramasami. The suit was filed by the plaintiffs for declaration of title to the suit properties and for an injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment. The first defendant is the divided brother of Ramasami. That the suit properties items 1 to 11 and 7 cents in item 12 were allotted to Ramasami in a partition between Ramasami and the first defendant has been found by the Courts below and that is not in dispute in this second appeal. Defendants 2 to 13 were not interested in the properties and therefore they did not defend the suit. The first defendant alone contended that Chinnathayee, the first plaintiff, was not the validly married wife of Ramasami and that therefore neither her daughter nor her son, namely, the second plaintiff or the third plaintiff was entitled to the properties. It is found by the Courts below that Chinnathayee was married to one Nagamuthu of Pagandai and that on an application filed by her to dissolve the marriage in O.P. No. 83 of 1960 on the file of the

Court of the Subordinate Judge, Cuddalore, the marriage was dissolved by a decree dated 31st October, 1960. It has also been found by the Courts below that the first plaintiff was married to the said Ramasami within about two months from the date of the dissolution of the marriage of the first plaintiff with Nagamuthu. The Courts below therefore held that under the proviso to section 15 of the Hindu Marriage Act as it stood prior to its amendment by Central Act LXVIII of 1976 the marriage between Ramasami and the first plaintiff was void, as having been contracted within one year from the date of the decree of the Court which dissolved the earlier marriage. On that ground, the suit was dismissed by the Courts below.

2. The main part of section 15 of the Hindu Marriage Act *as it stood* originally conferred a right on either party to the marriage to remarry after the earlier marriage has been dissolved by a decree of divorce. But the proviso provided that a remarriage to be lawful must be after the lapse of one year from the date of the decree. Thus a remarriage solemnized by either party in defiance of the rule laid down in that section prohibiting the same for a period of one year from the date of the decree of the Court of first instance is null and void. But the question for consideration is, as to what is to happen to the children born out of that marriage. Section 16 of the Hindu Marriage Act dealt with consequences of a decree of nullity granted in respect of any marriage under section 11 or section 12. This is not a case where there is any decree of nullity of the marriage under section 11 or section 12 of the Act. The argument of the learned counsel for the appellant is that the principle of section 16 is not to be restricted to a case of nullity granted to any marriage under section 12 alone; but the legitimacy will have to be implied even in respect of a marriage which has become void by reason of the contravention of the proviso to section 15. In support of this contention the learned counsel relied on a decision, of the Supreme Court reported in *Chandra Mohini* v. *Avinash Prasad*[1]. In that case the husband filed a petition for dissolution of marriage under section 10 of the Hindu Marriage Act read with section 13 (1) (*viii*) of the Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam Act XIII of 1962. Though the petition was originally dismissed, on appeal, by a decree dated 7th January, 1964, the High Court granted dissolution of marriage. The wife filed a petition for special leave to appeal to the Supreme Court. On 7th April, 1964, when that petition was pending, the husband married another woman on 2nd July, 1964 and a son was born to him by this marriage on 20th May, 1965. When the husband prayed the Supreme Court to revoke the Special Leave granted on the ground that he had already married another woman, the Supreme Court held that on that ground the Special Leave granted could not be revoked. It was pointed out to the Supreme Court that even under the main part of section 15, where the marriage has been dissolved, either party to the marriage can lawfully marry only when there was no right of appeal against the decree dissolving the marriage and the right to file an appeal by special leave granted could not be treated as a right of appeal vested in the party and that, therefore, the husband was within his right in marrying subsequent to the dissolution by the High Court. The Supreme Court observed that even though section 15 may not apply in terms and it may not have been unlawful for the husband to have married immediately after the High Court's decree as no appeal as of right from the decree of the High Court to the Supreme Court lies in that case the Supreme Court further observed that still it was for the husband to make sure whether an application for such special leave was filed and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to the Supreme Court. If he takes such a risk, he cannot ask the Court to revoke the Special Leave granted on that ground. Having held so, the Supreme Court further observed :

"We need not consider the question as to whether the child born to the new wife, on 20th May, 1965 would be

1. (1967) 1 S.C.R. 864 : (1967) 1 S.C.J. 42: A.I.R. 1967 S.C. 581.

legitimate or not, except to say that in such a situation section 16 of the Act may come to the aid of the new child."

It is seen from the decision that though *prima facie* the Supreme Court was of the view that section 16 would apply, they have not given any decision holding that section 16 would apply to such a case. But it is not necessary for me to pursue this question as sections 15 and 16 have been later on amended by the Marriage Laws (Amendment) Act (LXVIII of 1976). Section 10 of this Act deleted the proviso to section 15. Section 39 of this Act has made a special provision relating to pending cases. Under this provision, all petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the amending Act, shall be dealt with and decided by such Court if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act. In this suit the first defendant raised the question as to the validity of the marriage between Ramasamy and the first plaintiff under section 15 of the Act. So far as the issue relating to the validity of the marriage is concerned, it will have to be decided only with reference to the provisions of the Hindu Marriage Act as it is a proceeding "in causes and matters matrimonial". The amendment by reason of section 39 had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and those pending proceedings are to be decided only as per the amended provisions. If that is so, section 15 of the Hindu Marriage Act will have to be read as if there is no proviso. The result is, since there is a dissolution of the marriage and the first plaintiff married the deceased Ramasamy only after the dissolution of the marriage, though within a period of one year from the date of dissolution, the marriage is legal and valid. The first plaintiff as the legally married wife, and plaintiffs 2 and 3 as the legitimate children of Ramasamy, are therefore, entitled to inherit the property of Ramasamy, on his death. The plaintiffs are, therefore, entitled to the decree as prayed for in respect of items 1 to 11 and seven cents in items 1 to 11 and seven cents in item 12 which alone are found to be the properties of Ramasamy. The electric motor and pumpset which are found to be kept in common will have to be enjoyed also in common between the parties. The plaintiffs will be entitled to the declaration in respect of this common right also in regard to the electric motor and pumpset. The second appeal is accordingly allowed, the judgments and decrees of the Courts below are set aside and there will be a decree to the above effect in the suit. No costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—*A. D. Koshal, J.*

S. Misirilal .. *Petitioner**

v.

The Accommodation Controller, 2/2, Club House Road, Madras-2 .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 *(XVIII of* 1960), *section* 12 (i) *(b)—Scope and applicability—Petitioner's building under accommodation control—Petitioner applying to Accommodation Controller for release of the building—Petitioner's requirement of the building for demolition for erecting new building—Petition dismissed on the ground that the building was in good condition—Condition of building irrelevant—Order liable to be set aside.*

Section 12 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, has to be interpreted so as to mean that the condition of a building is not a relevant consideration for the purpose of deciding an application thereunder. [*Para.* 2.]

The Accommodation Controller was directed to decide the application on relevant considerations. [*Para.* 3.]

*W.P. No. 95 of 1973. 31*st March,* 1977.

Case referred to:

Messrs P.N. Shenoy v. *B.V. Shenoy*, (1970) 2 S.C.J. 601 : (1970) 3 S.C.R. 734 : A.I.R. 1971 S.C. 942.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to call for the records from the respondent relating to petitioners premises No. 5, Kollamman Koil Street, Old Washermanpet, Madras 21, inclusive of the respondent's proceedings in L.Dis. 26750 of 1971, dated 19th March 1973, Ref. A2. 9278 of 1971, dated 18th May, 1971 and K. Dis. 9911 of 1972, dated 18th December, 1972 and to issue a writ of *mandamus* calling upon the respondent to release the petition premises (*viz.*) first floor of premises No. 5 Kollamman Koil Street, Old Washermanpet, Madras-21 under section 12 (*i*) (1) of the Tamil Nadu Buildings (Lease and Rent Control) Act.

K. Shanmugham, for Petitioner.

C. Chinnaswami, for the Government Pleader, for Respondent.

The Court made the following

ORDER.—In the year 1972, the petitioner made an application to the Accommodation Controller Madras, under section 12 (i) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (hereinafter referred to as the Act) praying for the release of a building bearing No. 5 and situated in Kollamman Koil Street, Madras. That application was rejected through an order dated the 18th of December, 1972 passed by the Accommodation Controller on the ground that a similar application had been rejected by his predecessor in office on the 19th of March, 1972 for the reason that the building was in a good condition. It is the said order dated the 18th of December, 1972 by which the petitioner feels aggrieved and in this petition under Article 226 of the Constitution of India he prays that the Accommodation Controller be directed by a writ of *mandamus* to release the building under the said section of the Act.

2. The relevant portion of section 12 of the Act is reproduced below :

> " 12. (1) Notwithstanding anything contained in this Act on an application made by a landlord of a building in respect of which the Government shall be deemed to be the tenant, the authorized officer shall, if he is satisfied:
>
> (*a*) ....
>
> (*b*) that the building is *bona fide* required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the allottee to deliver possession of the building to the landlord before a specified date."

Under clause (*b*) above extracted all that the landlord is to prove is that his requirement of the building for demolishing it for the purpose of erecting a new building on the site thereof is *bona fide*, that is genuine. In interpreting a similar provision contained in sub-section (1) of section 21 of the Mysore Rent Control Act, their Lordships of the Supreme Court held in *Messrs P.N. Shenoy* v. *B.V. Shenoy*[1], that the landlord's *bona fides* have to be judged by the surrounding circumstances which will include his means for reconstruction of the building and other steps taken by him in that regard and that the condition of the building was not a relevant consideration for the determination of such *bona fides*. Their Lordships referred to clause (*b*) of sub-section (*i*) of section 14 of the Act, the language of which is identical with that of clause (*b*) above extracted and observed that a landlord could recover possession of his property for the purpose of reconstruction under section 14 (*i*) (*b*) in order to put the property to a more profitable use and that there was no justification for putting a narrow interpretation thereon. Section 12 (*i*) (*b*) of the Act must, therefore, be interpreted in the same manner *viz.*, so as mean that

1. (1970) 2 S.C.J. 601 : (1970) 3 S.C.R. 734: A.I.R. 1971 S.C. 942.

the condition of a building is not a relevant consideration for the purpose of deciding an application thereunder.

3. For the reasons stated, the impugned order cannot be sustained and is hereby set aside. However, the relief sought by the petitioner cannot be granted to him, because it is for the Accommodation Controller to decide his application with reference to relevant considerations. Accordingly the Accommodation Controller is directed to decide the petitioner's application over again and expeditiously in the light of the observations made above and in accordance with law. The parties are left to bear their own costs.

R.S. ———— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam and V. Ramaswami, JJ.*

Swamiappa Goundar and others .. *Appellants**

v.

Vettakaranpudur Mahajana Bank Ltd., by its Secretary, V. M. Meenakshisundaram Pillai and another .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 13—Debts incurred after the commencement of the Act—Re-opening of payments made by a debtor in accordance with contract and appropriated towards interest—If permissible.

Where a debtor has in fact paid interest at the contract rate which has been appropriated by the creditor towards interest he cannot have the transaction re-opened by calling upon the creditor to re-appropriate the amounts paid and appropriated in a different manner.

[*Para.* 2.]

Cases referred to :

Chellammal v. *Abdul Gaffoor Sahib*, (1961) 2 M.L.J. 222 : I.L.R. (1961) Mad. 1061 : 74 L.W. 556 : A.I.R. 1962 Mad. 1 (F.B.); *Nakramul* v. *B. Subba Rao*, (1957) 2 An.W.R. 53 : A.I.R. 1957 A.P. 546 ; *Krishniah* v. *Seshachalam*, (1965) 1 M.L.J. (S.C.) 86 : (1965) 1 An.W.R. (S.C.) 86 : (1965) 1 S.C.J. 533 : A.I.R. 1965 S.C. 639.

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Kailasam, dated 31st August, 1965 and passed in S.A. No. 377 of 1962 preferred against the decree of the District Court, Coimbatore, in Appeal Suit No. 305 of 1960 (O.S. No. 48 of 1959, District Munsif's Court, Udumalpet.

N. Varadarajan, for Appellant.

K. Sarvabhauman and *T.R. Mani*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—This Letters Patent Appeal arises out of the judgment of Kailasam, J., as he then was, rendered in Second Appeal No. 377 of 1962. The first respondent herein filed a suit on two mortgages for recovery of a sum of Rs. 4,586-6-8. The mortgages sued upon were: (*i*) Exhibit A-1, dated 30th December, 1942 for Rs. 4,000 executed by the defendants in favour of the plaintiff agreeing to pay interest at 6 per cent per annum payable half yearly and the default interest at 9 per cent. if the principal amount was not repaid within a period of two years; and (ii) Exhibit A-2, dated 23rd May, 1945 for Rs. 2,400 payable with interest at 9-3/8 per cent. re-payable in one year and in case of default in repayment default interest at 22½ per cent. is chargeable. The defendants who are the appellants herein had paid various amounts and those amounts have been adjusted by the plaintiff towords interest at the contract rate. On 24th October, 1956, the defendants issued a lawyer's notice to the plaintiff bank calling upon the bank to re-open the accounts and adjust the interest paid towards the mortgage debt calculating interest at the rate provided by section 13 of Act IV of 1938 as amended from

*L.P.A. No. 66 of 1966. 1st July, 1976.

time to time. Along with the said notice, the defendants enclosed a cheque for Rs. 3,403 which according to them was sufficient to discharge the entire mortgage debt. The plaintiff bank accepted the said payment but disputed the defendant's claim that the earlier appropriation of the amounts paid towards interest can be reopened. Thereafter the plaintiff bank filed O.S. No. 48 of 1959 on the file of the Court of District Munsif, Udumalpet, for recovery of the balance of the amount said to be still due. In the said suit, the defendants contended that all the payments made earlier should be reappropriated towards principal and interest on the basis of the statutory rate of interest and that the balance of the amount due on the mortgages if any arrived at after calculating interest at the said rate will alone be payable. The trial Court rejected the case of the defendants and decreed the suit. But the lower appellate Court however, upheld the contention put forward by the defendants that they were entitled to call upon the plaintiff bank to make a reappropriation of the amounts paid after calculating interest at the rate provided in section 13. Aggrieved against the said decision of the lower appellate Court, the plaintiff came to this Court by way of second appeal.

2. In the second appeal it was contended on behalf of the plaintiff bank that the view taken by the lower appellate Court was contrary to the Full Bench decision of this Court in *Chellammal* v. *Abdul Gaffoor Sahib*[1], and that the said Full Bench decision was a clear authority for the proposition that where a debtor has in fact paid the interest at the contract rate which has been appropriated by the creditor towards interest he cannot have the transaction reopened, by calling upon the creditor to reappropriate the amounts paid and appropriated in a different manner. The defendants however, contended that in view of the Full Bench decision of the Andhra Pradesh High Court in *Nainamul* v. *B. Subba Rao*[2], which has been approved by the Supreme Court in *Krishniah* v. *Seshachalam*[1] the view taken by the Full Bench in *Chellammal* v. *Abdul Gaffoor Sahib*[2], cannot be taken to be correct any longer, Kailasam, J., as he then was, who heard the second appeal has taken the view that the Supreme Court in *Krishniah* v. *Seshachalam*[1], was dealing with a case of a debt which was incurred before Madras Act IV of 1938 came into force while the case covered by the Full Bench decision of this Court in *Chellammal* v. *Abdul Gaffoor Sahib*[2], related to a debt which was incurred after the Act came into force that therefore, the Supreme Court cannot be taken to have doubted the correctness of the said Full Bench decision of this Court and that the Full Bench ruling is not in the least affected by the decision of the Supreme Court. In that view, the learned Judge allowed the second appeal, following the Full Bench decision in *Chellammal* v. *Abdul Gaffoor Sahib*[2].

3. In the Letters Patent Appeal, the appellants reiterate practically the same contentions that were urged before the learned single Judge. It is said that after the decision of the Supreme Court in *Krishnaiah* v. *Seshachalam*[1], which refers with approval the observations of Subba Rao, CJ., as he then was in *Nainamul* v. *B.Subba Rao*[3], the foundation of the decision of the Full Bench in *Chellammal* v. *Abdul Gaffoor Sahib*[2], had been shaken and that having regard to the fact that the Supreme Court has approved the observations of Subba Rao, CJ., in the decision in *Nainamul* v. *B. Subba Rao*, which has been specifically dissented by the Madras Full Bench in *Chellammal* v. *Abdul Gaffoor Sahib*[2], the Madras decision should be taken to have been overruled by the Supreme Court. We are not inclined to agree with the said contention of the learned counsel. Firstly, the Supreme Court in *Krishnaiah* v. *Seshachalam*[1], was dealing with a case relating to a debt incurred before the commencement of Madras Act IV of

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1. (1961) 2 M.L.J. 222 : I.L.R. (1961) Mad. 1061 : 74 L.W. 556 : A.I.R. 1962 Mad. 1.
2. (1957) 2 An.W.R. 53 : A.I.R. 1957 A.P. 546.

1. (1965) 1 M.L.J.(S.C.) 86 : (1965) 1 An.W.R. (S.C.) 86 : (1965) 1 S.C.J. 533 : A.I.R. 1965 S.C. 639.
2. (1961) 2 M.L.J. 222 : I.L.R. (1961) Mad. 1061 : 74 L.W. 556 : A.I.R. 1962 Mad. 1.
3. (1957) 2 An.W.R. 53 : A.I.R. 1957 A.P. 546.

1938 which is covered by sections 8 and 9 and therefore, their Lordships of the Supreme Court were concerned only with the scope and ambit of sections 8 and 9. There was no occasion for the Supreme Court to consider the scope and ambit of section 13 which directly arose for consideration both in the Madras Full Bench case and the Andhra Pradesh Full Bench case. It is true that the Supreme Court has referred to certain observations of Subba Rao, CJ., in the Andhra Pradesh Full Bench case. But the reference to those observations with approval by the Supreme Court cannot be taken to be approval of the decision as correct. As a matter of fact, the decision of the Full Bench in *Chellammal* v. *Abdul Gaffoor Sahib*[1], has also been referred to by the Supreme Court in the said decision and distinguished on the ground that it was a decision rendered under section 13. This clearly shows that the Supreme Court was not considering the correctness or otherwise of the decisions of either the Andhra Pradesh Full Bench decision or of the Madras Full Bench decision. Though the Supreme Court has referred to both the Full Bench decisions, it has not gone into the question as to which of them is correct. It is not therefore possible for us to say that the Supreme Court has approved the decision of the Andhra Full Bench and overruled the Madras Full Bench decision.

4. The learned counsel for the appellants then contends that as between the two differing views expressed in the Andhra Pradesh Full Bench decision in *Nainamul* v. *Subba Rao*[2] and the Full Bench decision of this Court in *Chellammal* v. *Abdul Gafoor Sahib*[1], the view expressed in the former case is preferable as being consistent with the object and the purpose of Madras Act IV of 1938. Though much can be said in favour of the view taken by the Full Bench of the Andhra Pradesh High Court in *Nainamul* v. *B. Subba Rao*[2], we are bound by the Full Bench decision of this Court in *Chellammal* v. *Abdul Gafoor Sahib*[1], which directly deals with the point in question. We have to therefore, follow the decision of the Full Bench in *Chellammal* v. *Abdul Gaffoor Sahib*[1], in preference to the view expressed by the Full Bench of Andhra Pradesh High Court in *Nainamul* v. *B. Subba Rao*[2] Andhra Pradesh.

5. The result is, the Letters Patent Appeal fails and it is dismissed. There will be no order as to costs.

R.S. —— *Appeal dismissed.*

1. (1961) 2 M.L.J. 222: I.L.R. (1961) Mad. 1061: 74 L.W. 556: A.I.R. 1962 Mad. 1.
2. (1957) 2 An.W.R. 53: A.I.R. 1957 A.P. 546.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Ranganayaki Ammal and others .. *Appellants**

v.

S. R. Srinivasan and others .. *Respondents*

Hindu Law—Suit for partition—Properties claimed as joint family properties—Burden of proof.

In a Hindu joint family, if one member sues for partition on the foot that the properties claimed by him are joint family properties then three circumstances ordinarily arise. The first is an admitted case when there is no dispute about the existence of the joint family properties at all. The second is a case where certain properties are admitted to the joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income available from joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The third head is that the properties standing in the names of female members of the family are benami and that such a state of affairs has been deliberately created by the manager or the head of the family and

1. (1961) 2 M.L.J. 222: I.L.R. (1961) Mad. 1061: 74 L.W. 556: A.I.R. 1962 Mad. 1.
2. (1957) 2 An.W.R. 53: A.I.R. 1957 A.P. 546.

*Appeal No. 187 of 1974. 13th August, 1976.

that really the properties or the amounts standing in the names of female members are properties of the joint family. It is by now well established that properties standing in the names of the female members are their own unless there is definite clinching proof to the contrary adduced by the challenging member. It is not for the female member to prove how she acquired the same. In ordinary cases also where a plea of benami is set up it is for the person who comes to Court to establish that the properties standing in the name of the other co-parceners or members are joint family properties which stemmed from the joint family nucleus. While considering the term 'nucleus' it should always be borne in mind that such nucleus has to be established as a matter of fact and the existence of such nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family property do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could, with reasonable certainty, be said that the other joint family properties have been purchased unless a strong link or nexus is established between the available surplus income and the alleged joint family properties. The person who comes to Court with such bare allegations without any substantial proof to back it up should fail. [*Para.* 5.]

The burden is very heavy on the plaintiff to establish the existence of joint family nucleus. The mere lapse of time will not relieve him from discharging his obligation. The march and passage of time cannot be taken advantage of by the challenging coparcener and this by itself would not enable him to relieve himself of his legal duty to prove the obvious, namely, that the family was possessed of funds and there was sufficient joint family nucleus from which the further accretions were made by the member managing the same. [*Para.* 13.]

Cases referred to :—

Mallesappa v. *Mallappa*, A.I.R. 1961 S.C. 1268; *Basang Singh* v. *Janaki Singh*, (1967) 1 S.C.J. 476: (1967) 1 S.C.R. 1: A.I.R. 1967 S.C. 341; *Naina Pillai* v. *Daivanai Ammal*, 43 L.W. 302 : A.I.R. 1936 Mad. 177; *Narayana Raju* v. *Chamaraju*, (1968) 2 S.C.J. 749 : (1968) 3 S.C.R. 464 : A.I.R. 1968 S.C. 1276; *Mst. Rukmabai* v. *Lala Laxminarayan*, (1960) 2 S.C.R. 253 : 1960 S.C.J. 433 : A.I.R. 1960 S.C 335.

Appeal against the decree of the Additional Subordinate Judge, Kumbakonam in Original Suit No. 7 of 1968.

R.G. Rajan and *R. Thyagarajan*, for Appellants.

S. Chellaswamy, D. Sadasivan, G.N. Chary, S. Sampath Kumar, R. Subramaniam and *A.P.S. Kasturirangam*, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Defendants 1 and 3 to 6 appeal against the preliminary decree for partition given by the learned Subordinate Judge of Kumbakonam. Srinivasa Iyengar had two sons, Ramaswami Iyengar and Rajagopala Iyengar. They originally constituted members of a Hindu undivided family. The plaintiff is the son of Ramaswami Iyengar. The first defendant is the second wife of Ramaswamy Iyengar. The second and the third defendants are the son and daughter of Ramaswami Iyengar through his second wife. The fourth and the fifth defendants are the children of the third defendant and the 6th defendant is the husband of the third defendant. The 7th and 8th defendants are the grandchildren of Ramaswami Iyengar born to his daughter Bhuma, who in turn was the first daughter through his first wife Padmasani Ammal. The case of the plaintiff is that Srinivasa Iyengar, Ramaswami Iyengar and Rajagopala Iyengar formed a Hindu undivided family and when he was an one month child, his mother Padmasani Ammal died and since then, he was with his maternal grand father for the purpose of education. He, however, admits that his father Ramaswami Iyengar spent for his maintenance and education and even for his upanayanam and marriage. The plaintiff retired after entering Government service in the year

1959. His father Ramaswami Iyengar died in 1964 leaving considerable joint family properties. He would concede that Ramaswami Iyengar executed several wills bequeathing properties to him and to defendants 1 to 5 and such wills are inoperative in the eye of law, as all the properties, which were the subject-matter of the wills, were to be deemed and held to be joint family properties. He therefore, ignores the said wills and he claims a 6/15th share in the totality of the suit properties. He also seeks for mesne profits in respect of his share and accounting regarding the same as against the defendants and for a further direction as against defendants 9 to 12 to deposit the amounts lying to the credit of T.S. Ramaswami Iyengar into Court and for costs. In the course of the pleadings, he would refer to an alleged sham legal proceedings in the year 1898 between T.S. Ramaswami Iyengar on the one hand and Srinivasa Iyengar and Rajagopala Iyengar on the other. That was a suit filed by the plaintiff's father for a partition of the joint family properties as against his father Srinivasa Iyengar and his brother Rajagopala Iyengar. That suit ended in a compromise. *Prima facie,* under the compromise decree in that suit, Ramaswami Iyengar did not receive any amounts or did not secure any joint family property, but on the other hand would take over the liability to pay a sum of Rs. 260 to his father and brother. Though no properties were actually taken over by Ramaswami Iyengar, yet the plaintiff's case is that his father was managing the joint family properties during the absence of his grandfather Srinivasa Iyengar and that he was also holding the office of karnam, as a trustee for the family, as that office was originally held by Srinivasa Iyengar and during the course of such managership and during the time when he exercised the office of karnam, which was an enviable one on those days, he secreted large amounts of the income from the joint family and lent moneys benami in the names of his second wife and second wife's children besides taking them in his own name and these amounts were all set out in the written statement (marked as Exhibit A-4) filed by Srinivasa Iyengar in the suit O.S. No. 65 of 1898 on the file of the Court of the District Munsif, Valangaiman at Kumbakonam and that, therefore, the *prima facie* recitals in the compromise decree are a make-belief affair. His further contention is that having secured such nucleus from the joint family after instituting a suit for partition, Ramaswami Iyengar, who was a very shrewd gentleman, developed the same by lending it to third parties and thereafter acquired considerable properties either in his own name or in the name of his second wife and children through her. According to the plaintiff, all the properties enumerated by him in the plaint schedule, though standing in the name of the female members of the family or other male members including Ramaswami Iyengar, should be deemed to be joint family properties, as there was sufficient joint family nucleus for the acquisition of such properties. The alternative case of the plaintiff is that Ramaswami Iyengar intended at all times to treat the properties either in his name or in the names of other members of the family as joint family properties. The case of blending is pleaded. On the foot of this alternative plea, it is said that Ramaswami Iyengar had always intended to treat the properties acquired by him, though as self-acquired properties, for the benefit of the entire family, and that therefore, the suit properties should be treated and held as joint family properties in which the plaintiff is entitled to his legitimate share.

2. The appellants as defendants would contend that the compromise decree in O.S. No. 65/1898 on the file of the Court of the District Munsif, Valangaiman at Kumbakonam cannot give the impression and much less the reasonable impression that it was a make-belief affair invented by the father and the two sons and that in fact Ramaswami Iyengar did not take at the time when he compromised the partition action and came forward from his family any share in the joint family properties. The enumeration of the various advances as if made by Ramaswami Iyengar either in his own name or in the name of his second wife and her children are fic-

titious, and at no time Ramaswami Iyengar did receive any benefit from the joint family either in the shape of secreting the income therefrom or utilising the same for his benefit to the disadvantage of the other co-parceners and that factually the properties which were the subject matter of the partition suit of 1898 were so unyielding and not valuable that it could not reasonably be said that there was considerable surplus income from the joint family properties which could have enabled Ramaswami Iyengar to slice away a portion of such income and secrete them and utilised them for the benefit of himself and his second wife and her children to the disadvantage of the plaintiff. The specific case of the defendants is that Ramaswami Iyengar, who was very forward by himself and who was considered as an Advocate-General by the residents of the village, earned by himself and such earnings of his had at no time any reference to the utilisation of the joint family surplus income. Ramaswami Iyengar was doing lucrative money lending business, the nucleus for which was provided by himself and as a karnam of the village and as a clerk in a Chettiar's firm and by his own efforts Ramaswami Iyengar acquired properties both moveable and immoveable after seeing his female and male children are duly educated and fully provided for at the appropriate times. The blending of the self-acquired properties with the so-called joint family properties is denied. The defendants would refute the claim of the plaintiff.

3. Regarding the deposits mentioned by the plaintiff in his plaint, defendants 9, 10, 11 and 12 have pleaded their respective cases. The 13th defendant, who is a tenant, says that he is an unnecessary party. Defendants 7, 8 and 14 to 19 remained *ex parte*. On the above relevant pleadings, the following issues were framed:

1. Whether the nucleus set forth in the plaint was true and constituted sufficient nucleus for later acquisitions and developments to make all the properties left by father Ramasami Iyengar as joint family properties?

2. Whether they have been thrown into joint stock?

3. Whether the plaintiff's mother left any jewels and the same could constitute a joint family nucleus?

4. Whether the plaint properties are joint family properties and which of the parties is in possession of the same?

5. Whether the several wills and dispositions, settlements etc., alleged by defendants are true, executed in a sound disposing state of mind and voluntary?

6. Whether they are vitiated by undue influence and pressure?

7. Whether the Wills, settlements and dispositions of monies, etc. are valid and binding on plaintiff and 2nd defendant?

8. Whether the plaintiff and 2nd defendant are estopped from questioning the wills and dispositions?

9. Whether the plaintiff and 2nd defendant are entitled to the share of 6/15 or any other share in suit properties and monies?

10. Whether plaintiff is not in joint possession?

11. Whether the 2nd defendant is liable to render an account in respect of "C" schedule and any and what moneys?

12. Whether there are amounts in deposits in the Banks (defendants 9 to 12) and whether they are bound to put the same into Court?

13. Whether the claim is barred by time?

14. Whether the suit is bad for non-joinder of parties?

15. Whether the valuation and Court-fees paid are correct?

16. What are the moveables, jewels cash, Bank deposits, etc., which are liable to division?

17. Whether defendants 1 and 3 also are not liable to render account as claimed?

18. What provision is to be made for charities?

19. Whether plaintiff is entitled to charge?

20. To what reliefs are the respective parties entitled?

4. On issues 1 to 4, the trial Judge answered them in favour of the plaintiff, but held under issue No. 3, that the jewels left by the plaintiff's mother could not have constituted the joint family nucleous. Under issues 5 to 8 the learned Judge held that the wills and gifts executed by Ramaswami Iyengar, were all executed by him, while he was in a sound disposing state of mind, but at the end would say that the wills and dispositions are binding only to the extent of 1/3 share of T. S. Ramaswami Iyengar in his property and that the plaintiff is estopped from questioning them to that extent. Certain other directions were given by the learned Judge regarding the accounting and ultimately, he gave a preliminary decree for partition and possession of the plaintiff's one-third share in cash deposits and in all the suit properties excepting the C schedule properties. He gave a decree for accounting against defendants 1 to 3 and directed the 9th defendant to deposit the fixed deposits amount in to Court. It is against this, defendants 1 and 3 to 6 have appealed.

5. We have already seen that the plaintiff, who was living all along away from the family since his childhood, can only speak to the broad probabilities, as he cannot pinpoint the issues which arose in this case. The burden no doubt is on the plaintiff to establish that there was adequate joint family nucleus out of which his father Ramasami Iyengar can reasonably be said to have acquired all the suit properties. In a Hindu joint family, if one sues for partition on the foot that the properties claimed by him are joint family properties, then three circumstances ordinarily arise. The first one is an admitted case where there is no dispute about the existence of joint family properties at all. The second is a case where certain properties are admitted to be joint family properties and the other properties in which a share is claimed are alleged to be the accretions or acquisitions from the income of the available joint family properties or in the alternative have been acquired by a sale or conversion of such available properties. The third head is that the properties standing in the names of the female members of the family are benami and that such a state of affairs has been deliberately created by the manager or the head of the family and that really the properties or the amounts standing in the names of female members are properties of the joint family. It is by now well established that properties standing in the names of the female members are their own, unless there is definite, clinching proof to the contrary by the challenging member. It is not for the female member to prove how she acquired the same. In ordinary cases also where a plea of benami is set up it is for the person who comes to Court to establish that the properties standing in the name of the other co-parceners or members are really joint family properties which stemmed from the joint family nucleus. While considering the term nucleus it should always be remembered that such nucleus has to be established as a matter of fact and the existence of such a nucleus cannot normally be presumed or assumed on probabilities. The extent of the property, the income from the property, the normal liability with which such income would be charged and the net available surplus of such joint family properties do all enter into computation for the purpose of assessing the content of the reservoir of such a nucleus from which alone it could with reasonable certainty be said that the other joint family properties have been purchased unless a strong link and nexus are established between the available surplus income and the alleged joint family properties; the person who comes to Court with such bare allegations without any substantial proof to back it up should fail. It is in this background that this case has to be considered.

6. We should first of all consider whether there was any motive or scheme when Ramaswami Iyengar filed O.S. No. 65 of 1898 on the file of the Court of the District Munsif, Valangaiman at Kumbakonam, for a partition of the joint family properties, which ultimately ended in a compromise. In the written statement filed by Srinivasa Iyengar exhibited as Exhibit A-4 the stand taken up by the father was that Ramaswami Iyengar took away cash from the family properties and that he had been doing money-lending business in his own name by utilising the same. He refers to certain properties as his own properties but would in the main contend that Ramaswami Iyengar during the time when he was managing the joint family and when he exercised the office of karnam, lent monies as stated in the third schedule to that plaint and would assert that he has secreted a sum to the extent of about Rs. 5,500. He also catalogues the debts of the family amounting to Rs 1,420 which were outstanding on that date. Ramaswami Iyengar was examined and his deposition is marked as Exhibit B-36 He would admit that he had independently borrowed monies and his father and his brother are not in any way responsible to pay those debts He would swear that the monies lent in the name of his wife belongs to her and that he was by then doing money-lending business of his own. In Exhibit B-36 as produced, there is no suggestion to Ramaswami Iyengar that these monies were secreted by him from the income of the joint family. There was no attempt on the part of Srinivasa Iyengar in that litigation to prove that the catalogued items in the third schedule to his written statement were all monies which at one time belonged to the joint family, and which were misappropriated by Ramaswami Iyengar. It was in these circumstances, that the compromise was effected. Under the compromise decree, Ramaswami Iyengar gave up all his rights in the family lands and took over the burden to pay his debts to which he spoke in his examination. Mr. Chellaswamy would contend that the enumeration of the details in the written statement of Srinivasa Iyengar to the effect that there has been such misappropriation would by itself be sufficient to give the impression that Ramaswami Iyengar secreted the family funds to his advantage. His argument is that the compromise decree and Fxhibits A-1 to A-4 which relate to the suit O.S. No. 65 of 1898 do give the impression that Srinivasa Iyengar and Rajagopala Iyengar gave up their right to the said sum of Rs. 5,000 misappropriated by Ramaswami Iyengar and in lieu thereof Ramaswami Iyengar gave up his right over the joint family properties. This is a very tall suggestion. This will be made clear from the conduct of the parties after the compromise decree and how the family properties were dealt with and that possibly could have been the income from the properties even assuming that Ramaswami Iyengar was for sometime in sole management of it. An accent is made on "குடும்ப கடன்" referred to in Fxhibit A-1. This is the compromise decree. If really the intentions of the parties were that there is such a misappropriation or appropriation of a sum of Rs. 5,000 by Ramaswami Iyengar, nothing prevented the parties from making a reference to it in the compromise memo. It is significantly silent about it. In fact, the "குடும்ப கடன்" referred to in Fxhibit A-1 compels the first and the second defendants to discharge them. Obviously, Ramaswamy Iyengar did not want to take a share in the family properties, as by then he was trying to stand on his own legs by exerting himself. This is clear from the fact that it is the admitted case of the parties that soon after the the compromise decree Ramaswami Iyengar shifted to Kumbakonam and began to earn on his own. The recitals in Fxhibit A-1 that the money-lending business was carried on in the names of himself and his wife or son and that Srinivasa Iyengar had nothing to do with them give a clue that the father and the brother never attempted to further their self-serving statements made in the written statement that such monies were carved out of the joint family. We are unable to agree with the reasoning of the learned judge that the dominant intention of Ramaswami Iyengar was to safeguard his assets from the purview of his father and brother. Until it is established

that such assets held by Ramaswami Iyengar had anything to do or something to do with the family properties and its income and unless such proof is available, it is difficult to hold that the compromise decree in the above suit should be understood as a mere camouflage and that Ramaswami Iyengar should be deemed to have misappropriated the family funds and the result of the compromise decree is that he severd his connections with the family after taking a substantial sum of about Rs. 5,000 from it. A reference is made to Exhibit B-164 wherein the recital is that Srinivasa Iyengar and Rajagopala Iyengar were selling the share obtained by them in the partition suit of 1898. This is pressed into service by Mr. Chellaswamy who contends that there were an effective partition and a mutual release as between the parties and that, therefore, it cannot be said that Ramaswami Iyengar left the family without taking any benefit from it. Here again it is a matter of speculation. The plaintiff, who spoke in the box, was giving out a story of which he is not personally aware. It is not difficult to conceive that Ramaswami Iyengar, who was shrewd and more dynamic than the other members of the family, wanted to get out of it as early as possible, and he instituted the partition action so that the division in status and by metes and bounds may be put on record. It is also not impossible to conceive that a coparcener, who was able to stand on his own and who was able to earn by his own efforts would give up his rights in the joint family totally and would prefer to come out of it rather than be in it taking no benefit under it, but only liabilities. That Ramaswami Iyengar was having money-lending business is admitted by Srinivasa Iyengar in Exhibit A-4. Exhibit A-93 is yet another document which shows that Ramaswami Iyengar was doing business of his own. It is the common case of all parties that Ramaswami Iyengar was the karnam of the village. This happened at a time when Srinivasa Iyengar was absent from the village. As the office of karnam was hereditary in those days, Ramaswami Iyengar was appointed to that office. Srinivasa Iyengar did not have the authority to transfer that office to Ramaswami Iyengar. On account of the fortuitous circumstances resulting from the absence of Srinivasa Iyengar from the village, the appropriate authority should have thought fit to appoint Ramaswami Iyengar as the karnam, as he was the son of the last holder of the office. The trial Judge himself concedes that Ramaswami Iyengar should have earned handsomely when he was functioning as karnam. He would also characterise him as a person, who was consulted by the villagers and as one who was looked upon as Advocate General by the residents of the village. The lower Court fell into a fallacy when it assumed that Srinivasa Iyengar transferred the office of karnam to Ramaswami Iyengar and that Ramaswami Iyengar was holding the office of karnam as trustee of the family. All the income earned by Ramaswami Iyengar as karnam of the village being the result of gains of learning are his own properties, and cannot be treated as assets belonging to the joint family. We are unable therefore, to agree with the trial Court that all such income earned by Ramaswami Iyengar and which was utilised by him in his money-lending business, should be deemed to be family properties in which Srinivasa Iyengar and Rajagopala Iyengar had a share. We have already referred to the fact that in the compromise decree or in the proceedings, there was no pointed reference to the fact that all the income earned by Ramaswami Iyengar as karnam should be deemed to be joint family income. Even if it is possible to cull out from the pleadings any such suggestion, they were not furthered and the position would not be as now put forward by the learned counsel for the respondents. Thus, the reasonable impression gained on a study of the relevant exhibits connected with the partition action of 1898 is that Ramaswami Iyengar, who was by then earning as a karnam and as a money-lender wanted to sever his connections with the family which was not affluent so that he would stand on his own and own properties of his own without the same being shared by his father or his brother. We are unable to hold that

at the time when Ramaswami Iyengar left the family in consequence of the partition decree, he left it with substantial joint family nucleus in his hands and which nucleus was the foundation for further earnings and further acquisitions thereafter.

7. This leads on to the question, whether there could have been any surplus income in the family which owned only about 9 acres of land on the whole. Soon after the partition Srinivasa Iyengar and Rajagopala Iyengar began to sell the properties which they took over under the partition decree. Under Exhibit B-160, 21 cents of land were sold for Rs. 20. Under Exhibit B-121 of the year 1902, 73 cents were sold for Rs. 165. Under Exhibit B-162, three acres and 63 cents were sold for Rs.1,000 to clear off antecedent debts. After selling away a sizable portion of the family properties taken over by them, the balance thereof were divided under Exhibit B-63 between Srinivasa Iyengar and Rajagopala Iyengar. A reading of this document shows that what was divided amongst them were very small extents of land. It is, therefore, fairly clear that in order to discharge very small debts, Srinivasa Iyengar and Rajagopala Iyengar had to sell away the corpus of the family. If really there was considerable income from the family properties taken over by Srinivasa Iyengar and Rajagopala Iyengar, then there was no necessity at all, for the sales under Exhibits B-160, B-161 and B-162. Apart from the bare suggestion made by the plaintiff, who was not in the know of things at the appropriate time, there is no evidence to show that during the time when Ramaswami Iyengar managed the joint family properties, there was such considerable income and necessarily surplus income, which could form the nucleus for the investments made by Ramaswami Iyengar, when he was managing the family during the absence of his father. The argument is repeated before us by Mr. Chellaswamy that there was such income. This argument is based on pure speculation as the learned Judge calls it 'broad probabilities'. We have already expressed the view that the earnings of Ramaswami Iyengar as karnam cannot be added on to the income of the joint family. The probability, therefore, is that such income, which was his own was utilised by Ramaswami Iyengar, when he lent monies to third parties either in his own name or in the name of his wife. One other faint argument was that the sales under Exhibits B-160, B-161 and B-162 were distress sales. There is no warrant for this at all. The sales were made in order to pay off debts; possibly there was no income, and, therefore, the corpus had to be sold to pay off debts.

8. Mr. Chellaswamy wants to rely upon the observations of the Supreme Court in *Mallesappa* v. *Mallappa*,[1] These observations are torn out of the context. We do not think that in that case any departure has been made from the well-known rule that proof of the existence of a joint family does not by itself lead to the presumption that the property held by any member of the family is joint and that the burden lies on the one who asserts that any such item of property was joint and he has to establish it. One method by which it could be established that a particular property is joint family property is to prove by acceptable evidence the possession of a nucleus of joint family property or family funds. If the possession of an adequate nucleus is shown, it is then open to the member, who claims the property as his self-acquisition to prove that no portion of the family funds was utilised by him for acquisition. But if the fundamental fact of the existence of available surplus income or adequate nucleus is not established, then the presumption works the other way and the properties standing in the name of a particular member, in such circumstances, would be deemed to be his property, unless the contrary is established in a manner known to law by the challenging member. Having regard to the treatment of the property by Srinivasa Iyengar and Rajagopala Iyengar, we

1. A.I.R. 1961 S.C. 1268.

are unable to hold that there was such adequate nucleus or family funds which formed the basis for the further acquisitions of properties by Ramaswami Iyengar after he shifted to Kumbakonam.

9. There are also certain statements made by the plaintiff himself which are against his interest and which also would throw light upon the fact that there was no joint family nucleus. In Exhibit B-37 the plaintiff asked for funds for his further education. There is no whisper about the existence of joint family property. On the other hand, for a paltry sum of Rs. 204 he would request his father to earn it and send it to him. If really the family was possessed of considerable income the plaintiff would not have written such a letter. A suit, filed by the husband of one of the daughters of Ramaswami Iyengar against Ramaswami Iyengar and the plaintiff and the second defendant was settled out of Court and the plaintiff and the second defendant were not made liable to the suit claim. This was obviously because there was no joint family property in the hands of Ramaswami Iyengar, which could be proceeded against. In that suit, a written statement which was adopted by the plaintiff herein filed by the second defendant herein, is very significant. The plaintiff would admit that the properties in the possession of Ramaswami Iyengar are his own self-acquisitions and defendants 2 and 3 have no control over the same, and that, therefore, they were at the absolute disposal of Ramaswami Iyengar. He would also add that he and the second defendant herein did not possess any joint family assets and that none of the properties mentioned in the plaint which were by then owned by Ramaswami Iyengar has become blended or merged in the joint family properties. In Exhibit B-129 of the year 1944, the plaintiff would again categorically refer to the fact that there were no joint family assets or properties in the hands of Ramaswami Iyengar. In this letter he confirms that he has received various sums from his father, who paid the same for his education. The comment is that these letters were written with a motive to Ramaswami Iyengar from his son. The plaintiff is not such a gullible person. He spoke the truth and emphasised the reality. For more than two decades, the plaintiff's consistent case was that there was no joint family property and that everything which was available with Ramaswami Iyengar was his own.

10. The question arose whether the admission in the pleadings made by the plaintiff in Exhibit B-39 with reference to a suit of 1937 was evidence and was admissible in evidence. Though statements in pleadings are not automatically acceptable as evidence, yet statements made by a person against his own interest and at a time when he could have laid threadbare the correct facts would be admissible evidence and the situation arising out of such candid admissions cannot be lightly got over by the person who pleaded in that way. In *Basang Singh* v. *Jaraki Singh*[1] the Supreme Court held:

> "Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true."

The insipid explanation to get over the written statement and the admissions as above by P.W. 1 does not appeal to us at all. It would be difficult to agree with him that he did not sign the written statement, but the advocate adopted it. He is an educated person and he cannot be allowed to say now that he adopted a written statement without knowing its contents.

11. The above admissions and the conduct of the plaintiff spread over a long period of time is an indication to show that at no time the plaintiff felt that there were joint family properties and income from such properties which could be availed of by him at a later stage.

1. (1967) 1 S.C.J. 476 : (1967) 1 S.C.R. 1; A.I.R. 1967 S.C. 341.

12. We have already touched upon the fact that the family properties of an extent of 9 acres odd could not have yielded so much income so as to leave a surplus in the hands of the manager for him to utilise the same for the benefit of the members of the family.

13. Mr. Chellaswami, would contend that they were fertile lands and that Ramaswami Iyengar was in management of the family properties for a period of seven years and, therefore he must have retained with him sufficient surplus income of the joint family. Reference is made to Exhibits B-40 and B-41. He would urge that Ramaswami gave up his claim in the family properties because it was advantageous to him. No doubt, he would also advance the argument that the earnings of Ramaswami Iyengar as a karnam should be deemed to be joint family income. All these contentions found favour with the trial Court. But we are unable to agree with them. The family had to sell alm st the entirety of the family properties to discharge paltry debts. There is nothing compelling in the recitals in these deeds which would prompt us to hold that the sales under Exhibits B-160 to B-164 were all distress sales. The burden is very heavy on the plaintiff to establish the existence of joint family nucleus. The mere lapse of time will not relieve him from discharging his obligation. The march and passage of time cannot be taken advantage of by the challenging coparcener and this by itself would not enable him to relieve himself of his legal duty to prove the obvious,namely, that the family was possessed of funds and that there was sufficient joint family nucleus from which the further accretions were made by the member managing the same.

14. Another interesting contention raised by the plaintiff is that Ramaswami Iyengar should be deemed to have annexed all the suit properties to the joint family and blended them as such and, therefore, he would be entitled to his legitimate share therein notwithstanding the fact that the properties are in the names of Ramaswami Iyengar or his near and dear. Whether in a given case there was such blending leading to the reasonable impression that the member or the coparcener has totally and fully abandoned and relinquished his rights over such properties acquired by him is one of fact and has to be established by acceptable material. It is not mere physical mixing of the income of such properties and not even acts of generosity by which the father or the head of the family allowed others to participate in such income would lead to the presumption that the property has been blended with joint family property. As early as 1936 Madhavan Nair, J., made it clear in *Naina Pillai* v. *Daivanai Ammal*[1], thus:

> "By merely being dealt with as joint family property the self-acquired property of the person who deals with it as such does not necessarily lose its character of separate property. The person who alleges that the property is joint family property must show that the owner has voluntarily thrown the property into the joint stock with the intention of abandoning all separate claims on it."

This principle has been approved by the Supreme Court in *Narayana Raju* v. *Chamaraju*[2], as follows :

> "It is a well established doctrine of Hindu law that property which was originally self acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims to it. But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from kindness or affection. The important point to keep in mind is that the separate property of a Hindu

1. 43 L.W. 302: A.I.R. 1936 Mad. 177.
2. (1968) 2 S.C.J. 749: (1968) 3 S.C.R. 464: A.I.R. 1968 S.C. 1276.

coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct."

It, therefore follows that until there is clinching proof of relinquishment or abandonment of separate claims over the separate property of a member of a Hindu joint family and until it is shown that as a consequence of such abandonment, he has mixed up the said property inextricably with the joint family funds or other properties so that the quondam independent character of the property as self acquired property is lost the doctrine of blending cannot lightly be invoked. We are, therefore, unable to accept the alternative contention of Mr. Chellaswami that the self-acquired properties of Ramaswami Iyengar were so mixed up so as to lose its character and stamp of self-acquired property and acquired a new status of joint family property.

15. The father executed several wills Exhibits B-1 to B-10 and under Exhibits B-6 and B-7 he has settled valuable properties as set out in the E schedule to the plaint in favour of the plaintiff. He also settled from time to time properties in favour of the first, second third and the fourth defendants. The plaintiff was receiving the income from the E schedule properties and there is no reason to disbelieve D.W. 5 when he says that the plaintiff has entered into possession of such properties settled on him by his father. The father has consistently from 1937 to 1964 treated these properties and described them as his self-acquisitions. The plaintiff never took any objection to such a treatment of the properties. Even if it could be presumed that the plaintiff was helping his father that by itself is not sufficient; as acts of generosity and kindness by a father by which the son was allowed to participate in the administration of his self-acquired properties or enjoy a part of its income by itself would not be evidence to sustain the contention that the self acquisitions of the father are joint family properties. A curious reasoning of the learned Judge is that Ramaswami Iyengar was an independent person and a shrewd person too and, therefore, he brought out all instruments such as wills and settlements. But this would be begging the question. Though the conduct or admissions by one or the other of the members of a joint family to meet a particular contingency or to get an advantage are not of much value in determining jointness or otherwise of the family, yet their assertion in relation to the estate is an important factor, which should be taken into consideration in determining not only the factum of severance in a family but also as regards the character of the property as well. *Vide Mst. Rukmabai v. Lala Laxminarayan and others*[1]. The stamps and badges which would ordinarily distinguish self-acquired property from joint family property are very well-known. The property should have been acquired by the member, may be the father by his own exertions and such acquisitions should be without any reference to or with the aid of family funds and lastly, such properties were not mixed up with the family property with the intention of bringing it to the hotchpot of the joint family. In our case, we find that every indicia to badge the suit properties as the self-acquired properties of Ramaswami Iyengar is available. Ramaswami Iyengar was by himself a very capable person. As a karnam, he ought to have earned by himself. This is also clear from Exhibit A-93. He was convicted under section 406, Indian Penal Code, for having converted pledged goods. This was in the year 1900. We are referring to this exhibit only to show that as early as 1900 Ramaswami Iyengar was lending money and held himself out as a money lender. After going to Kumbakonam, he was employed in a flourishing concern and it is not in dispute that although he was employed as a clerk, he was independently exercising

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1. 1960 S.C.J. 433: (1960) 2 S.C.R. 25 A.I.R. 1960 S.C. 335.

a vocation of money lending. He used to borrow monies at a smaller rate of interest and lend it for higher rate of interest. The learned Judge himself finds that T.S. Ramaswami Iyengar was very frugal and financially sound. But he fell into an error in assuming that the source of such business was ancestral nucleus. No doubt, he performed the marriages of the female members and was admittedly lending monies on othis and promissory notes and is supposed to have maintained account also. The uncharitable remark of the learned Judge that D.W. 5 should be deemed to have suppressed the accounts is not borne out by evidence. Ramaswami Iyengar was being assessed as an individual to income-tax. Thus, it is seen that whilst the conduct of the plaintiff in having accepted the settlement deed Exhibit B-7 is not explained satisfactorily by the plaintiff, the other surrounding circumstances of the case are clear pointers to the fact that Ramaswami Iyengar, when he dealt with the suit properties under Exhibits B-1 to B-10, was dealing with his own self-acquisition; and not the joint family properties.

16. The question of accounting would arise only if the properties were joint family properties. As in our view, all the suit properties should be deemed to be and held as the properties of Ramaswami Iyengar, in which the plaintiff did not acquire a right by birth, no such accounting can be directed, as it is not possible.

17. As regards the wills and settlement deeds, no question has been raised before us. There was no argument before us that they were not executed when T.S. Ramaswami Iyengar was in a sound and disposing state of mind. We are not, therefore, referring to this and we accept the finding of the Court below that the wills have been executed validly by Ramaswami Iyengar, when he was in a sound state of mind.

18. In the result, we hold that the suit properties are not joint family properties and that Ramaswami Iyengar had the requisite authority and competence to settle or will away the same, as he did under Exhibits B-1 to B-10 and that the plaintiff is not entitled to a decree for partition and separate possession as claimed by him.

19. The appeal is, therefore, allowed with costs.

R. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

V. Bapu Kalingarayar .. *Appellant**

v.

Rajam *alias* Rajalakshmi Ammal and another .. *Respondents.*

Promissory note—Suit on—Note executed in favour of R*—Suit filed by* A *and* V *alleging that* R *was their power-of-attorney agent — Suit not maintainable since* A *and* V *were neither payees nor endorsees — Question of law can be raised even later though not raised in the written statement.*

A suit was filed by *A* and *V* on a promissory note dated 26th August, 1965 executed by *K* and *C* in favour of *R* for a sum of Rs. 3,100. The plaintiffs alleged that *R* was their power-of-attorney agent and they relied upon a letter dated 14th January, 1969 given by *K* to them as an acknowledgment of liability for the purpose of limitation. The defendant contended that the said letter was executed only after the debt was barred by limitation though dated 14th January, 1969. On the date on which the suit was posted for judgment the plaintiff filed an application for amendment of the plaint alleging that the defendant had acknowledged the liability in another letter addressed to *R* bearing postal seal of 23rd August, 1968 and that in any event the letter of 14th January, 1969 amounted to an express promise to pay the borrowed debt. The trial Court rejected the application and dismissed the suit as barred by limitation. The lower Appellate Court however allowed the amend-

* S.A. No. 1312 of 1974. *9th February,* 1977.

ment sought and decreed the suit. The defendant also contended that the suit was not maintainable on the ground that neither *A* nor *V* was payee or endorsee under the promissory note.

On further appeal to the High Court,

Held: It was open to the lower Appellate Court to consider the question whether the amendment of the plaint prayed for by the plaintiffs and disallowed by the trial Court could be allowed and the lower Appellate Court had the right to allow the amendment.

[*Para.* 4.]

The question raised as to the maintainability of the suit was one of law and a mere perusal of the promissory note and the plaint would show that the note had been executed in favour of *R* and that the respondents were not payees or endorsees and it was only necessary for the appellant to bring this fact to the notice of the Court in connection with the legal submission that the suit by the respondents, who were not either the payees or endorsees of the promissory note was not maintainable. Under the circumstances, the suit which had been filed on the promissory note by the respondents who were not either the payees or endorsees was not maintainable. [*Para.* 8.]

Cases referred to:—

Parmeshri Das v. *Fakiria,* (1921) 60 I.C. 772; *Gobinda Mal* v. *Santa,* (1915) 26 I. C. 441; *Jogeshwar Roy* v. *Raj Narain Mitter,* (1904) I.L.R. 31 Cal. 195; *Hindu Mish* v. *Heramba Chandra,* (1911) 13 C.L.J. 139; *Yakub Ebrahim Sayani* v. *Bai Rahimathai,* (1908) 10 Bom.L.R. 346; *Thakar Das* v. *Sant Ram,* A.I.R. 1949 E.P. 219; *Gunnaji Bhawaji* v. *Mahanji Khoosal Chand,* (1910) I.L.R. 34 Bom. 250; *Seth Nanak Chand Shadiram* v. *Amin Chand Pyarilal,* A.I.R. 1970 Cal. 8; *Satyadhyan Ghosal* v. *Smt. Deorajan Debi,* (1960) 3 S.C.R. 590: A.I.R. 1960 S.C. 941; *Maharajah Moheshur Singh* v. *Bengal Government,* (1857-59) 7 M.I.A. 283; *Chinnaswami Naicker* v. *Kandasami Gounder,* (1969) 1 M.L.J. 393: A.I.R. 1970 Mad. 81; *Madina Bibi Sahiba* v. *Ismail Durga Association,* (1940) 1 M.L.J. 872: 51 L.W. 608: I.L.R. (1940) Mad. 818: A.I.R. 1940 Mad. 789; *Ma Shwe Mya* v. *Maung Mo Hnaung,* (1921) I.L.R. 48 Cal. 832; *Subba Narayana Vathiyar* v. *Ramaswami Aiyar,* (1907) I.L.R. 30 Mad. 88; 16 M. L. J. 508; *Gurumurthi* v. *Sivayya,* (1898) I.L.R. 21 Mad. 391; *Bojjamma* v. *Venkataramayya,* (1898) I.L.R. 21 Mad. 30; *Ramanuja Ayyangar* v. *Sadagopa Ayyangar,* (1905) I.L.R. 28 Mad. 205: 15 M.L.J. 249; *Krishna Ayyar* v. *Krishnasami Ayyar,* (1900) I.L.R. 23 Mad. 597; *Subbaraya Chettiar* v. *Abirami Ammal,* I.L.R. (1964) 2 Mad. 720: 77 L.W. 524: A.I.R. 1965 Mad. 157; *Venkatarama Reddiar* v. *Valli Akkal,* 68 M. L. J. 81: I. L. R. 58 Mad. 693: 41 L.W. 15: A.I.R. 1935 Mad. 181 (F. B.); *Chinnakuzhandai Ammal* v. *Veerasami Mudaliar,* 41 L.W. 281: 68 M.L.J. 713: A. I. R. 1935 Mad. 312; *Veeraraghavasami* v. *Mancamma,* (1939) 2 M.L.J. 812: 50 L.W. 917: A.I.R. 1940 Mad. 90; *Muthu Veeran Chetty* v. *Govindan Chetty,* (1961) 2 M.L.J. 470: I.L.R. (1961) Mad. 908: 74 L.W. 422: A.I.R. 1961 Mad. 518; *Mackentich* v. *Stewart and Company Limited,* A.I.R. 1970 S.C. 839.

Appeal against the decree of the District Court, West Thanjavur at Thanjavur in Appeal Suit No. 82 of 1973, preferred against the decree of the Court of the Subordinate Judge of Thanjavur in Original Suit No. 21 of 1972.

T. R. Srinivasan and *K. Ramamoorthy,* for Appellant.

T. N. Manikanteswaran, for Respondents.

The Court delivered the following

JUDGMENT.—The defendant, who failed in the Lower Appellate Court is the appellant. The respondents filed the suit for the recovery of money due on the promissory note Exhibit A-1 dated 26th August, 1966 executed by the appellant and his brother's son Chocka-

lingam in favour of one Ramanatha Iyer, for Rs. 3,100 alleged to have been advanced by the respondents, according to whom Ramanatha Iyer was their power of attorney agent. The respondents filed the suit though another power-of-attorney agent on 17th January, 1972 and relied upon the letter Exhibit A-2 dated 14th January, 1969 given by the appellant to them as an acknowledgment of liability for the purpose of limitation.

2. The appellant's defence was that the letter Exhibit A-2 was executed only in January, 1970 after the claim had become barred by limitation, though it is dated 14th January, 1969, and that the suit is, therefore, barred by limitation. After arguments were advanced and judgment was reserved, the respondents filed an application for amendment of the plaint on the date on which the suit was posted for judgment. The amendment prayed for was to the effect that appellant had acknowledged the liability by another letter Exhibit A-3 bearing the postal date seal 23rd August, 1968 and addressed to Ramanatha Iyer and that, in any event, Exhibit A-2 cannot be construed as an acknowledgment and it constitutes an express promise to pay the borrowed debt and it is not a void agreement in view of section 25 (3) of the Contract Act. The trial Court dismissed that application and another application filed on the same date to reopen the case observing that the proposed amendment seeking to rely upon Exhibit A-2 as an agreement to pay a barred debt introduces a new case, which has not been pleaded in the original plaint. The learned District Munsif found that Exhibit A-2 had been executed in January, 1970 as contended by the appellant more than three years after the date of the suit promissory note Exhibit A-1 and would not save limitation and he dismissed the suit without costs holding that the suit was barred by limitation. But, on appeal the learned District Judge agreed with the trial Court in coming to the conclusion that Exhibit A-2 was executed only in January, 1970, but however, held that it amounted to an agreement to pay the barred debt and would enable the respondents to recover the amount in view of section 25 (3) of the Contract Act and he allowed the appeal with costs throughout.

3. Two points were urged before me by Mr. T. R. Srinivasan, the learned counsel for the appellant and they are: (1) that the letter Exhibit A-3 bearing the postal date seal of 23rd August, 1968 is addressed to Ramanatha Iyer and has not been relied upon as an acknowledgment of liability for the purpose of limitation and the letter Exhibit A-2 having been admittedly obtained only in January, 1970 would not save limitation and (2) that the respondents, who are not the payees in the promissory note, Exhibit A-1, are not entitled to maintain the suit on the promissory note. The letter Exhibit A-3 had not been relied upon in the lower appellate Court even in the memorandum of grounds of appeal and the learned District Judge has not relied upon it, as saving limitation in his judgment where he has proceeded on the basis that Exhibit A-2 would amount to a promise in writing, signed by the person charged therewith to pay wholly the debt of which the creditor might have enforced payment but for the law of limitation of suits as required by section 25 (3) of the Contract Act and that the suit is, therefore, in time. The learned counsel for the appellant submitted that there is no allegation in the plaint that by Exhibit A-2, the appellant had promised to pay wholly or in part the promissory note debt, the claim in respect whereof would otherwise be barred by limitation and that it is, therefore, not open to the Court to give relief to the respondents on the basis of Exhibit A-2. But the learned counsel for the respondents relied upon some decisions which would be referred to presently and submitted that the trial Court ought to have allowed the amendment prayed for and that it is open to the Court to take note of Exhibit A-2, as a promise to pay the barred debt and give relief to the respondents. The first decision relied upon by the learned counsel for the respondents in this connection is of a Bench of the Lahore High Court in *Parmeshri Das* v.

Fakiria[1], where the learned Judges had observed:

"*Gobinda Mal* v. *Santa*[2], followed *Jogeshwar Roy* v. *Raj Narain Mitter*[3] and held that under Order 7, rule 6, Civil Procedure Code, the plaintiffs were bound to show in the plaint, the grounds upon which exemption from the law of limitation was claimed and that, as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, plaintiffs could not be allowed to rely on it ...... In *Hindu Mish* v. *Heramba Chandra*[4], it was pointed out that the case of *Jogeshwar Roy* v. *Raj Narain Mitter*[3] did not lay down any inflexible rule of law, and it was held that if the plaint shows the ground of exemption the requirements of the Code were satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground; and the Court allowed the plaintiff to urge that the suit was not barred by limitation for a reason different from the one assigned in the plaint ...... We agree with the intepretation put upon the law in *Yakub Ebrahim Sayani* v. *Bai Rahimathai*[5] and *Hindu Mish* v. *Heramba Chandra*[4] and consider that the plaintiffs should not be debarred from putting forward the admission of the defendants made by them in their written statement of the 25th June, 1906."

This decision of the Lahore High Cout has been followed by Achhru Ram, J., of the East Punjab High Court in *Thakar Das* v. *Sant Ram*[6] in rejecting the contention urged before him that the plaintiff having claimed exemption from the law of limitation only under section 20 on the ground of part payment of the principal cannot be permitted to claim exemption on the ground of acknowledgment under section 19 of the Limitation Act.

4. The next decision relied upon by the learned counsel for the respondents is of a Bench of the Bombay High Court in *Gunnaji Bhawaji* v. *Mahanji Khoosalchand*[1]. In that case, as in the present case, after hearing of the suit brought by the plaintiff for the recovery of a sum due on the foot of an account the defendant raised the plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The trial Court presided over by Russell, J., refused the application. But on appeal, it was held by the Bench that the view of Russell, J., that the amendment asked for would convert the suit into one of a different and inconsistent character was incorrect and that it would remain the same based upon exactly the same cause of action except for the addition of one allegation and that the amendment should be allowed as shown in paragraph I of the memorandum of appeal. The learned Judges allowed the amendment and granted leave to the defendants to file a supplemental written statement if they were so advised. No doubt, the course adopted by the learned Judges in that case had not been adopted by the learned District Judge in the present case, for he had remained content with criticising the trial Cour for not allowing the amendment, but did not specifically allow the amendment and grant an opportunity to the appellant to file a supplemental written statement if he is so advised. Though, as already stated, he had proceeded on the basis that the letter Exhibit A-2 would amount to a promise to pay the barred debt within the meaning of section 25 (3) of the Contract Act, it is not necessary to go into this question in greater detail having regard to the view which I am going to take about the maintainability of the

1. (1921) 60 I.C. 772.
2. (1915) 26 I.C. 441.
3. (1904) I.L.R. 31 Cal. 195.
4. (1911) 13 C.L.J. 139.
5. (1908) 10 Bom.L.R. 346.
6. A.I.R. 1949 East Punj. 219.

1. (1910) I.L R. 34 Bom. 250.

suit filed by the respondents on the promissory note in which they are not the payee or indorsees. However, it may be necessary to say that it was open to the learned District Judge to consider the question whether the amendment should have been allowed even though no revision or appeal had been filed against the order of the trial Court disallowing the application for amendment. The learned counsel for the respondents submitted that it was open to the lower appellate Court to go into that question under the provisions of section 105 (2) of the Code of Civil Procedure. In *Seth Nanak Chand Shadiram* v. *Amin Chand Pyarilal*[1], Ray, J., as he then was, who spoke for the Bench had observed:

> "The recent decision of the Supreme Court in *Satyadhyan Ghosal* v. *Smt. Deorajin Debi*[2] considered the scope and meaning of section 105 of the Civil Procedure Code. The Supreme Court said that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, could be challenged in an appeal from the final decree or order. This decision is an authority for the proposition that though an appeal could have been taken from the order refusing the application for amendment on the ground of limitation, yet the question could be agitated in appeal from the decree inasmuch as the order affects the decision from which an appeal has been preferred. The Supreme Court referred to the decision of the Judicial Committee in *Maharajah Maheshur Singh* v. *Bengal Government*[3], where the Judicial Committee said that it would be the duty of the Court to correct erroneous interlocutory orders though not brought under their consideration until the whole cause had been decided and brought by appeal for adjudication.
>
> I am therefore of opinion that it is open to the appellants to contend that the amendment should have been allowed."

In view of this decision I agree with the learned counsel for the respondents that it was open to the learned District Judge to consider the question whether the amendment of the plaint prayed for by the respondents and disallowed by the trial Court could be allowed and that the Lower Appellate Court had the right to allow the amendment. The learned counsel for the appellant relied upon a decision of Veeraswami, J., as he then was in *Chinnaswami Naicker* v. *Kandasami Gounder*[1]. There the learned Judge observed thus:

> "No doubt amendment of pleading should be freely allowed, at whatever stage it is asked for. But, this can only be subject to the pleas as to limitation or other prejudice to the other party. If the suit had been instituted on 21st July, 1967, it would undoubtedly be barred by limitation. Mr. Desikan for the petitioner urges that *Madina Bidu Sahiba* v. *Ismail Durga Association*[2], is distinguishable on the ground that there application for amendment of the plaint was taken out after issues had been framed and the trial held thereon. But I see no difference in principle, whether the amendment is sought for after the expiry of the period of limitation and at the stage of trial, before or after. The principle is that an application for amendment of the pleading should be within the time allowed for the institution of the suit".

This decision does not help the appellant, for the amendment petition in the present case which was filed on 22nd November, 1972 did not seek to rely upon any new ground, but only sought to make it appear that the letter Exhibit A-2 which had already been relied upon for

1. A.I.R. 1970 Cal. 8.
2. (1960) 3 S.C.R. 590 : A.I.R. 1960 S.C. 941.
3. (1857-59) 7 M.I.A. 283.

1. (1969) 1 M.L.J. 393 : A.I.R. 1970 Mad. 81.
2. (1940) 1 M.L.J. 872 : 51 L.W. 608 : I.L.R. (1940) Mad. 808 : A.I.R. 1940 Mad. 789.

the purpose of limitation would amount to an agreement to pay a barred debt, a valid agreement, within the meaning of section 25 (3) of the Contract Act. In this connection the learned counsel for the appellant relied also upon a decision of the Privy Council in *Ma Shwe Mys* v. *Maung Ma Hnaung*[1], where it was observed that the real question in controversy between the parties in those proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain and that when once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in the opinion of the Lordships of the Privy Council be to go outside the provisions established by the Code of Civil Procedure, to which reference had been made before them. This decision also will not apply to the facts of the present case where the respondents did not seek to set up a new contract or a new ground, but only sought to contend that Exhibit A-2 which had been relied upon for the purpose of limitation is a valid agreement within the meaning of section 25 (3) of the Contract Act to pay the entire amount due under the barred promissory note, Exhibit A-1.

5. The learned counsel for the appellant relied upon a decision of the Full Bench of this Court in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[2], where the question for consideration was whether it was open to the defendant in a suit on a negotiable instrument to plead that the payee named in the instrument, or the indorsee, as the case may be, is a mere benamidar, and not entitled to recover the amount due under the promissory note. It was observed in that decision thus:—

1. (1921) I.L.R. 48 Cal. 823.
2. (1907) I.L.R. 30 Mad. 88 : 16 M.L.J. 508.

"In *Paramasiva Mudali* v. *Kannimuthu*[1], as already stated it was held, we think, that an undisclosed principal cannot be sued on a negotiable instrument. In *Ganapati Naiken* v. *Saminatha Pillai*[2], it was held that a benamidar cannot sue on a negotiable instrument and in *Gurumurthi* v. *Shivayya*[3]; it was held (but without referring to the terms of the Act), that an infant was entitled to sue by his his next friend on a note taken by his mother in her own name on account of his estate. These decisions have not been followed until the present case and must in our opinion be overruled. On the other hand, it was held in *Bojjamma* v. *Venkataramayya*[4], dissenting from *Ganapati Naiken* v. v. *Saminatha Pillai*[2], that it was but open to the defendant to plead that the payee or indorsee was a mere benamidar, and quite recently it has been held, we think rightly, in *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*[5], that a minor cannot sue on a promissory note taken in the name of his adoptive mother. The decision in *Krishna Ayyar* v. *Krishnasami Ayyar*[6], as to the liability of the other members of a joint family on a bill accepted by the managing member proceeded upon considerations of Hindu Law and does not affect the present question."

Yet another decision relied upon by the learned counsel for the appellant in this connection is of Veeraswami, J., as he then was in *Subbaraya Chettiar* v. *Abirami Ammal*[7], where the learned Judge has observed:

"He contends that the plaintiff could in no sense be described as a holder

1. S.A. No. 182 of 1891 (unreported.).
2. C.R.P. No 578 of 1895. (unreported).
3. (1898) I.L.R. 21 Maf. 391
4. (1898) I.L.R. 21 Mad. 30.
5. (1905) I.L.R. 28 Mad. 205 : 15 M.L.J. 249.
6. (1900) I.L.R. 23 Mad 597.
7. I.L.R (1964) 2 Mad. 720 : 77 L.W. 524: A.I.R. 1965 Mad. 157.

of the promissory note, and the suit, so far as his client was concerned, being wholly rested on the promissory note, she could not, in the absence of an endorsement or transfer of the promissory note in her favour, maintain the suit against the second defendant and recover on the basis of the promissory note. I accept this contention. No stranger to a contract can sue upon it. That is a basic principle of law. This principle is applied to Negotiable Instruments Act, which is but a part of the law of contract. Apart from that, section 8 of the Negotiable Instruments Act clearly defines a holder as a person entitled, be it noted, in his own name to the possession of the promissory note and to receive or recover the amount due thereon from the parties thereto. The rights of an endorsee to sue on the promissory note are rested on special statutory provisions. Though the plaintiff's case was that she was the beneficial owner of the promissory note as the consideration therefor proceeded from her, inasmuch as she was not the holder of the promissory note, it would follow that she could not, on the basis of merely being the beneficial owner thereof, sue to recover the money due on the promissory note.

6. This point was decided by *Venkatarama Reddiar* v. *Valli Akkal*[1]. Varadachariar, J., speaking for the Full Bench, while holding that the beneficial owner could not, on the strength of that title, maintain a suit on a promissory note, observed further:

> "It may be that even upon getting a declaration to this effect (that he is the beneficial owner), the beneficiary will not directly be able to sue upon the promissory note; but that does not mean that a declaration of this kind will be futile. Under other provisions of the Trusts Act, the beneficiary can sue for the execution of the trust by compelling the trustee to take the necessary steps and have a Receiver appointed in the course of such proceedings so that the Receiver may sue for the debt, or the beneficiary may also insist upon the trustee conveying the legal title to himself and after such transfer there will be no difficulty in his suing upon the promissory note in his own name".

This decision is clear authority for the proposition that even after getting a declaration by the beneficial owner of his status as such, he could not sue upon the note unless he got a transfer of it in his name in a suit to compel the promisee to effect a transfer or he filed a suit on the strength of the declaration to enforce the trust in an appropriate manner. This priciple has been followed in *Chinnakuzhandai Ammal* v. *Veerasami Mudaliar*[1] and *Veeraraghavasami* v. *Mancamma*,[2] in both of which the facts were more or less similar".

These two decisions amply support the contention of the learned counsel for the appellant that the respondents, who are not the payees in the suit promissory note, Exhibit A-1, and had not filed the suit as the endorsees thereof, are not entitled to maintain the suit on the promissory note though the consideration for the same proceeded from them and the promissory note, Exhibit A-1 had been executed in favour of one Ramanatha Iyer, who appears to have been the power of attorney agent of the respondent, though he has not been described as such in Exhibit A-1.

7. The learned counsel for the respondents contended that it is open to the respondents, the beneficiaries to file the suit on the promissory note. In this connection, he relied upon a decision of the Full Bench of this Court in *Muthu Veeram Chetty* v. *Govindan Chetty*[3]. But that decision does not help the res-

1. 4 L.W. 15 : 68 M.L.J. 81 : I.L.R. 58 Mad. 693: A.I.R. 1935 Mad. 181 (F.B.).

1. 14 L.W. 281 : 68 M.L.J. 713 : A.I.R. 1935 Mad. 312.

2. (1939) 2 M.L.J. 812 : 50 L.W. 917 : A.I.R. 1940 Mad. 90.

3. (1961) 2 M.L.J. 470 : I.L.R. (1961) Mad. 908 : 74 L.W. 422 : A.I.R. 1961 Mad. 518.

pondents, for that was a case where a promissory note which had been executed in favour of one member of a joint family, had been allotted to another member of a joint family at a partition of the joint family properties without any endorsement of transfer or deed of assignment and it had been held that the suit filed on the note by the member to whose shares the promissory note had been allotted at a partition was maintainable. It is not the case of the respondents that in any partition between themselves and the promisee, Ramanatha Iyer, the suit promissory note had been allotted to their share and they have thereby become entitled to recover the amount.

8. The learned counsel for the respondents next relied upon a decision of the Supreme Court in *Mackertich* v. *Stewart and Company Limited*[1], where it has been observed that a point not raised in the written statement cannot be allowed to be raised during the trial. The learned counsel for the respondents submitted that the appellant had not taken the plea in the written statement that it was not open to the respondents, who are not the payees or the endorsees of the suit promissory note to maintain the suit on the promissory note. It is not possible to accept this contention having regard to the fact that the question raised by the learned counsel for the appellant is one of law and a mere perusal of the promissory note and the plaint would show that it has been executed in favour of Ramanatha Iyer and that the respondents are not payees or endorsees, and it is only necessary for the appellant to bring this fact to the notice of the Court in connection with the legal submission that the suit by the respondents, who are not either the payees or endorsees of the promissory note is not maintainable. Under the circumstances, I agree with the learned counsel for the appellant that the suit which has been filed on the promissory note by the respondents who are not either the payees or endorsees is not maintainable.

1. A.I.R. 1970 S.C. 839.

9. The second appeal is, therefore, allowed, but in the circumstances of the case without costs throughout, and the suit is dismissed.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Ramanujam, J.*

V. K. Margachari and another .. *Appellants**

v.

M. R. Krishnaswami Mudaliar and another .. *Respondents.*

(A) *Tamil Nadu Debt Relief Act* (*XXXVIII of* 1972), *section* 6—*Tamil Nadu Indebted Agriculturists* (*Temporary Relief*) *Act* (*X of* 1975), *section* 4—*Mortgage decree — Judgment-debtor's property brought to sale — Judgment-debtor obtaining benefit as non-agriculturist under Act XXXVIII of* 1972 — *Judgment-debtor becoming agriculturist subsequently—Whether can seek benefit under Act X of* 1975 *as agriculturist—Estopped from claiming relief.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 47.

Though the judgment-debtor satisfied the definition of an agriculturist in section 2 (*b*) of the Tamil Nadu Act X of 1975 on the date of sale of his property under a mortgage decree the fact that he had obtained benefit under the Tamil Nadu Act XXXVIII of 1972 on the basis that he was a non-agriculturist debtor will stand in his way of his claiming the benefit of stay under section 4 of the later Act. The judgment-debtor having earlier taken up the position that he was a non-agriculturist debtor and obtained the benefits accrued thereunder on that basis, he would be estopped from claiming that he was an agriculturist and therefore he was entitled to invoke the provisions of the Tamil Nadu Act X of 1975.

[*Para.* 13.]

*A.A.O. No. 183 of 1976. 13*th June*, 1977.

It is not open to the judgment-debtor to invoke section 4 of the Tamil Nadu Act X of 1975 in view of his earlier conduct in getting the benefit of scaling down of the debt under section 68 of the Tamil Nadu Act XXXVIII of 1972.
[*Para.* 13.]

Nor can the appellant-judgment-debtor claim to set aside the sale under section 41, Civil Procedure Code, on the ground that he is entitled to stay under section 4 of the Tamil Nadu Act X of 1975 which had ceased to have operation it being a general rule that if a temporary statute expired by efflux of time, it should be deemed that the Act never existed on the statute book. [*Para.* 14.]

Case referred to:—

Nachimuthu Chettiar v. *Moorthammal*, (1976) T.L.N.J. 367.

Appeal against the order of the Court of the Subordinate Judge, Vellore, dated 28th February, 1976 and made in Execution Application No. 450 of 1975 and 628 of 1975 in Execution Petition No. 17 of 1975 in Original Side No. 295 of 1972.

M. N. Padmanabhan, for Appellants.

J. Kanakaraj and *M. S. Umapathy,* for Respondent No. 2.

O. V. Baluswami, for *R. Nallathambi,* for Respondent No. 1.

The Court delivered the following

JUDGMENT.—This appeal arises out of an order of the lower Court dismissing an application filed by the appellants herein under section 47 of the Code of Civil Procedure wherein they sought for a declaration that the Court sale held on 7th July, 1975 in E.P. No. 17 of 1975 in O.S. No. 295 of 1972 on the file of the Sub-Court, Vellore, is void and inoperative.

2. The appellants herein, father and son respectively, are the judgment-debtors under a mortgage decree in O.S. No. 295 of 1972 on the file of the Sub-Court, Vellore. The first respondent herein is the decree holder and the second respondent is the Court auction-purchaser of the mortgaged property in execution of the mortgage decree, dated 31st October, 1974 in a Court sale held on 7th July, 1975 in E.P. No. 17 of 1975. In the execution petition, the Court had ordered notice to the appellants and they entered appearance through their counsel on 26th February, 1975 and sought time till 5th March, 1975 for filing their objections. On 5th March, 1975, their counsel made an endorsement on the execution petition that they had no objection. Thereafter there was the fixation of the upset price, the settlement of sale proclamation, and the sale was posted to 23rd June, 1975. In the meantime, the appellants filed an application under Order 21, rule 69 of the Code of Civil Procedure to adjourn the sale on payment of Rs. 200. The sale was then adjourned to 7th July, 1975. The appellants then filed E.A. No. 255 of 1975 under section 4 of the Tamil Nadu Ordinance I of 1975 seeking stay of the execution. The said application was opposed by the decree-holder and it was finally posted for hearing on 11th July, 1975. The appellants again filed an application E.A. No. 323 of 1975 for stay as the lower Court had ordered the sale of the mortgaged property by 7th July, 1975. They referred therein to the pendency of the application E.A. No. 255 of 1975 in which they claimed to be agriculturists entitled to the benefits of the Ordinance, and prayed that till that application was disposed of, the sale should be postponed. The lower Court adjourned that stay application for disposal to 30th July, 1975. In the meanwhile, the sale had been held in pursuance of the orders of Court on 7th July, 1975 and the mortgaged property has been purchased by the second respondent for a sum of Rs. 31,000. Later on, the two applications *viz.*, E.A. No. 255 of 1975 and E.A. No. 323 of 1975 had been dismissed on the ground that the sale had already taken place.

4. After the sale, the appellants herein filed two applications, *viz.*, (1) E.A. No. 450 of 1975 to declare the said sale void on the ground that the said sale was inoperative and without jurisdiction in view of section 4 of the Tamil Nadu Indebted Agriculturists (Tempo-

rary Relief) Act (X of 1975) and (2) E.A. No. 628 of 1975 for setting aside the Court sale on the ground that the same was contrary to section 23-C of the Tamil Nadu Agriculturists Debt Relief Act (IV of 1938), as amended by Act VIII of 1973. These two applications were opposed both by the decree-holder and the Court auction-purchaser on the ground that the appellants having claimed and obtained the benefits of the Tamil Nadu Act XXXVIII of 1972 on the basis that they are debtors as defined in that Act, they are not entitled to claim benefits of the Tamil Nadu Act X of 1975 on the contrary basis that the first appellant is an agriculturist in view of the specific provisions contained under the proviso to the definition of a "debtor" in Act XXXVIII of 1972 which says that an agriculturist as defined in the Tamil Nadu Act IV of 1938 shall not be deemed to be a debtor, and that the appellants were not entitled to claim the benefits of section 23-C of the Tamil Nadu Agriculturists Relief Act (IV of 1938), as the sale had been held after 1st March, 1972, the date of publication of the Tamil Nadu Amending Act III of 1973.

4. The Court below upheld the objections of the decree-holder and the Court auction-purchaser and dismissed both the applications holding that the sale held on 7th July, 1975 is not void as alleged by the appellants and that the sale having been held long after 1st March, 1972, section 23-C of the Tamil Nadu Act IV of 1938 has no application.

5. The appellants have challenged the decision of the lower Court so far as it relates to the rejection of their application under section 47 of the Code of Civil Procedure. They have not, however, challenged the order of the lower Court so far as it relates to their claim for protection under section 23 (*c*) of the Tamil Nadu Agriculturists Relief Act, IV of 1938. Therefore, the only question that has now to be decided in this appeal is whether the sale held on 7th July, 1975 in E.P. No. 17 of 1975 in O.S. No. 295 of 1972 is void and without jurisdiction as contended by the appellants.

6. The appellants' plea that the sale held on 7th July, 1975 is void is based on the assumption that the first appellant is entitled to a stay of the execution under section 4 of the Tamil Nadu Act X of 1975 and that the sale held overlooking the said provision is void and inoperative. To establish the claim that the first appellant is entitled to the benefit of stay under section 4 of the Tamil Nadu Act X of 1975 he has to establish that he is an agriculturist debtor.

7. When the matter came up for consideration before this Court on an earlier occasion, the Court felt that the evidence on record was not sufficient to support the allegation that the first appellant owns and possesses an extent of 19 cents of land and as such an agriculturist, and therefore called for a finding from the Court below on the question whether the first appellant is an agriculturist or not. The lower Court has since submitted its finding dated 8th December, 1976. In the said finding the lower Court has dealt with the evidence in detail and held that the first appellant was an agriculturist on 7th July, 1975, the date of sale. Though the finding rendered by the Court below has been questioned by the respondents, I am inclined to accept the said finding having regard to the documents and other materials referred to by the lower Court. I have therefore, to proceed on the basis that the first appellant was an agriculturist on 7th July, 1975, the date of sale.

8. The substantial point that has been urged by the learned counsel for the appellants is that once the first appellant is an agriculturist as contemplated by the Tamil Nadu Act X of 1975, he is entitled to have the execution stayed under section 4 and that the sale having taken place during the pendency of his application for stay of sale under that section it is void. The learned counsel relies on the decision of this Court in *Nachimuthu Chettiar* v. *Moorthammal*[1], in support of his stand. In that case, in execution of a mortgage decree, properties had been sold overlooking an application filed by the judgment-debtor under

1. (1976) T.L.N.J. 367.

section 20 of the Tamil Nadu Act IV of 1938 for stay of the execution for the purpose of enabling the judgment-debtor to file an application for relief under section 19. It was contended on behalf of the judgment-debtor in that case that that while an application under section 20 of the Tamil Nadu Act IV of 1938 for stay of the execution of the decree was pending, the execution Court has no jurisdiction to direct the sale of the property and that as the sale has been held in contravention of section 20, the same is void and inoperative in law. That contention was accepted by the Court below. Before this Court, the decree-holder contended that section 20 of the Tamil Nadu Act IV of 1938 does not affect the jurisdiction of the executing Court to execute a mortgage decree by the sale of the hypotheca, that the mere pendency of an application under section 20 does not take away the said jurisdiction of the executing Court to execute the decree and that section 20 is only directory and not mandatory. This Court held that section 20 is a mandatory provision and that as such if the sale is held contrary to section 20, it can be set aside under section 47 of the Code of Civil Procedure. The above decision is an authority for the proposition that if a sale is held in contravention of a statutory provision, the same can be set aside under section 47 of the Code of Civil Procedure. That decision is based on the fact that section 20 is a mandatory provision and that if the sale is held in contravention of that provision, it should be taken to be void.

9. We are here concerned with the interpretation and scope of section 4 of the Tamil Nadu Act X of 1975. That section says that all further proceedings in suits for the recovery of debts and applications for the execution of decrees for payment of money passed in a suit for the recovery of a debt in which the relief is claimed against an agriculturist shall stand stayed until the expiry of a year from the date of the commencement of that Act. That Act came into force on 16th January, 1975 and the stay of proceedings contemplated under section 4 is for a period of one year from that date *viz.*, 16th January, 1975. If the first appellant is an agriculturist as defined in that Act, then section 4 can be taken as a fetter on the executing Court not to proceed with the sale till the expiry of the one year period referred to therein. In this case, as already stated, the first appellant has filed an application for stay under section 4 of the Ordinance I of 1975 and not under the Tamil Nadu Act X of 1975. Even assuming that the application filed by the first appellant under the Ordinance is deemed to have been filed under section 4 of the Tamil Nadu Act X of 1975, he has to satisfy the definition of an "agriculturist" in section 2 (*b*) of the Tamil Nadu Act X of 1975.

10. The term "agriculturist" is defined in section 2 (*b*) of the said Act as a person who owns an interest in agricultural land and who, by reason of such interest, is in possession of such land. In view of the findings rendered by the Court below that the first appellant is an agriculturist on the date of the sale, section 4 will have to normally operate. However there is one other statutory provision which stands in the way of the first appellant claiming the benefit of Act X of 1975 as an agriculturist. In this case, the preliminary decree has been passed on 22nd December, 1972 and the final decree has been passed on 2nd July, 1974. At no stage prior to the passing of the decree, the appellants claimed that they are agriculturists. On the other hand, they claimed benefit only under the Tamil Nadu Debt Relief Act, 1972, Tamil Nadu Act XXXVIII of 1972. In fact, the first appellant was held entitled to the benefits of the said Act on the ground that he is not an agriculturist. Though in the plaint it has been specifically averred that the appellants are not agriculturists as per the Tamil Nadu Agriculturists Relief Act IV of 1938, the appellants have not denied the same in the written statement. In the application filed by the first appellant for relief under the Tamil Nadu Act XXXVIII of 1972, the decree-holder, first respondent, pleaded that the first appellant is not entitled to the benefits of that Act.

However, the Court held the first appellant to be entitled to the benefits of the said Act and scaled down the mortgage debt as per section 6 of that Act. Therefore, as it is, the first appellant claimed benefit under the Tamil Nadu Act XXXVIII of 1972 on the ground that he is not on agriculturist-debtor. After having scaled down the debt under section 6 of that Act on that basis, the first appellant now turns round and says that he is an agriculturist entitled to the benefit of section 4 of the Tamil Nadu Act X of 1972 as well as the benefit under section 23-C of the Tamil Nadu Act IV of 1938. As already stated, the Court below has rejected the first appellant's claim for relief under section 23-C of the Tamil Nadu Act IV of 1938 on the ground that that section is inapplicable as the sale had taken place after 1st March, 1972. But the fact remains that simultaneously the first appellant claims benefit under section 4 as also the benefit under section 23-C of the Tamil Nadu Act IV of 1938.

11. Thus, the first appellant came forward with a plea that he is not an agriculturist at the stage of the suit and obtained relief on that basis for scaling down of the decree and at the stage of the execution he has come forward with a new case that he is an agriculturist and as such entitled to claim benefit on that basis. The first appellant got the benefit of scaling down under section 6 of the Tamil Nadu Act XXXVIII of 1972 on the ground that he is a non-agriculturist-debtor entitled to the benefits of that Act. The debtor is defined in section 2 (3) as a person from whom any debt is due; Proviso (ii) thereto says that a person shall not be deemed to be a debtor if he is an agriculturist as defined in the Tamil Nadu Act IV of 1938 and is entitled to the benefit of the said Act. The first appellant claimed to be a debtor as defined in that Act and it is on that basis, he got the benefit of scaling down of the decree. He got the benefit of section 6 only on the ground that he is a debtor and not an agriculturist as defined in the Tamil Nadu Act IV of 1938. As already stated at no stage of the suit, the first appellant claimed to be an agriculturist entitled to the benefits of the Tamil Nadu Act IV of 1938. It is only after getting the benefit of section 6 of the Tamil Nadu Act XXXVIII of 1972, the first appellant has come forward with a plea that he is an agriculturist entitled to the benefit of section 4 of the Tamil Nadu Act X of 1975 and section 23-C of the Tamil Nadu Act IV of 1938.

12. The learned counsel for the respondents contends that is not open to the first appellant to plead or take inconsistent pleas that the first appellant having got the benefit of section 6 of the Tamil Nadu Act XXXVIII of 1972 on the ground that he is a non-agriculturist debtor, it is not open to him now to claim that he is an agriculturist at the stage of execution for the sake of having the execution stayed. On a due consideration of the matter, I am inclined to agree with the submission of the learned counsel for the respondents. It is clear from the provisions of the Tamil Nadu Act XXXVIII of 1972 that a person can claim benefit under the Tamil Nadu Act XXXVIII of 1972 only if he is not an agriculturist-debtor. The fact that the first appellant claimed that he is not an agriculturist-debtor and got the benefit of scaling down under section 6 of that Act, clearly indicates that he was not an agriculturist on 2nd July, 1974 when the final decree was passed.

13. The first appellant's own case is that he has got 19 cents of land by virtue of a settlement after the death of the settlor and his wife in the year 1973 and he became an agriculturist thereafter. The finding of the lower Court also is that the first appellant was an agriculturist only on the date of the sale *i.e.*, on 7th July, 1975. Though the first appellant satisfied the definition of an agriculturist in section 2 (*b*) of the Tamil Nadu Act X of 1975 on the date of the sale, the fact that he has obtained the benefit under the Tamil Nadu Act XXXVIII of 1972 on the basis that he is a non-agriculturist-debtor will stand in his way of claiming the benefit of stay under section 4 of the later Act. The first appellant having earlier taken up the

position that he is a non-agriculturist-debtor and obtained the benefits accrued thereunder on that basis, he is estopped from claiming that he is an agriculturist and therefore he is entitled to invoke the provisions of the Tamil Nadu Act X of 1975. Though the earlier decision of the Court holding the first appellant as a non-agriculturist-debtor and granting him the benefit of scaling down under section 6 of the Tamil Nadu Act XXXVIII of 1972, may not operate as *res judicata* since the first appellant having obtained that benefit on the plea that he is a non-agriculturist-debtor, he cannot now turn round and say that he is an agriculturist-debtor and therefore he is entitled to the benefit of section 4 of the Tamil Nadu Act X of 1975. Therefore, it is not open to the first appellant now to invoke section 4 of the Tamil Nadu Act X of 1975 in view of his earlier conduct in getting the benefit of scaling down of the debt under section 6 of the Tamil Nadu Act XXXVIII of 1972.

14. Besides, the Tamil Nadu Act X of 1975 is a temporary statute and it has expired by efflux of times. Though the Tamil Nadu Act XV of 1976 has taken the place of the Tamil Nadu Act X of 1975 the latter has ceased to have effect. It is a general rule of interpretation that if a temporary statute expires by efflux of time, it should be deemed that the Act never existed on the statute book. Therefore, the first appellant cannot claim to set aside the sale under section 47 of the Code of Civil Procedure on the ground that he is entitled to stay under section 4 of the Tamil Nadu Act X of 1975 which has now ceased to have any operation. Therefore, in any view of the matter, the first appellant cannot have the sale set aside under section 47 of the Code of Civil Procedure. The appeal is therefore dismissed. There will, however, be no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

S. S. Khader Mohammed Rowther and Co., represented by its Proprietor S. Syed Aswudeen

.. *Petitioner**

v.

G. S. Sundaram and Brothers

.. *Respondent.*

(A) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960), *as amended by Act (XXIII of* 1973), *sections* 10 (3) (a) *and* (e)—*Scope and applicability — Landlord of a non-residential building — Petition for eviction for personal occupation—Tenant absent on the date of hearing—Eviction ordered —Rent Controller to be satisfied of claim of the landlord as* bona fide—*Rent Controller's impression regarding* bona fide *to be carried out in the order — Order without showing such satisfaction of the Rent Controller is a nullity.*

(B) *Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of* 1960) *as amended by Act (XXIII of* 1973), *section* 25 — *Powers of the Revisional Authority.*

Section 10 (3) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, provides for eviction of tenants in cases where the landlord requires the building for his own occupation. Sub-clauses (*i*) to (*iii*) lay down the particular circumstances under which a landlord can ask for eviction of the tenant. Sub-clause (*i*) deals with residential buildings; sub-clause (*ii*) deals with non-residential buildings which are meant, or actually used, for stationing vehicles; sub-clause (*iii*) deals with other non-residential buildings. It may be that the language of sub-clause (*iii*) as compared with sub-clauses (*i*) and (*ii*) is susceptible of a narrow, literal, interpretation, but it is the common acceptation of lawyers and Courts that this provision, like

* C.R.P. No. 818 of 1977. 29*th April*, 1977.

the other two following provisions in the same sub-section, lays down two indispensable conditions for an eviction petition. The landlord must be in need of the premises under the tenant's occupation for the purpose of his own business or that of a member of his family. The landlord must have no other non-residential building of his own elsewhere in the same city, town or village concerned.

[*Para*. 8.]

The Act also lays down how, and in what manner, the Rent Controller should deal with the landlord's claim and give it a proper disposal. When a landlord files a petition to evict the tenant of a non-residential building, naturally the Rent Controller will first examine whether the petitioner satisfies the two initial requirements, one, that the landlord is badly in need of the buildings for carrying on his business; and two, that he has no other building which he can call his own elsewhere in the same city. If these requirements are not fulfilled, the petition for eviction fails then and there at the initial stage. But the jurisdiction of the Rent Controller is not cut out by the terms of section 10 (3) (*a*) (iii) alone. The real crux of the Rent Controller's jurisdiction lies in section 10 (3) (*a*) (iii). The language in which this jurisdiction is defined by the Legislature is elaborate. It is quite clear that the Rent Controller has to act only according to the dictates of this clause and not in any other way. No latitude or discretion is permitted to him. He certainly has jurisdiction to allow the eviction petition and direct the tenant to put the landlord in possession of the premises. But he can do so only on his being satisfied that the landlord's claim for relief is *bona fide*. If in the case before him, the Rent Controller is not so satisfied he shall reject the eviction petition. The real foundation of the Rent Controller's order, then, is the formation of his satisfaction, one way or the other, on the question of the landlord's *bona fides*. He cannot either allow or reject the eviction petition without forming this satisfaction. For a Court or a tribunal to be satisfied about something it is essential it should have applied its mind to that subject. In this sense, satisfaction is a mental thing. But it is implicit in our Court system that the Court's satisfaction, in order to be recognisable as such, must always and ever find verbal expression, to enable one to know whether there has been any satisfaction at all and, if so, what in the mind of the Court.

[*Paras*. 9, 10, 13.]

The significance of the other statutory expression *'bona fides'* cannot also be missed. In the context of section 10 (3) (*e*) dealing with the jurisdiction of the Rent Controller the phrase has a special significance. The provision demands that the landlord's claim must be held to be one made in good faith. His prayer before the Rent Controller is statedly for an order directing the tenant to put him in possession and it is statedly addressed for a particular purpose, to wit, his pressing need for accommodating his own business in those very premises. In this context the question of *bona fide* lies in this; that the landlord does not desire the removal of the tenant as an end in itself, but only as a means to an end. It is on this aspect on which the Act requires the Rent Controller to dwell and form his own satisfaction. All this shows that a Rent Controller cannot sustain an action for eviction order on the basis merely, of what the landlord or his business manager says from the witness-box. Apart from testing the veracity of the witness, the Rent Controller must also see whether the landlord's move is not just a device to get rid of the tenant. He must see whether the landlord really means business and wants it to be set up in, or shifted to the premises in question. In the very nature of the enquiry, therefore, these impressions have got to be put down in writing by the Rent Controller himself, while passing the order. They are not things which can be filled in according to the fertility of the reader's imagination.

[*Paras*. 14, 15.]

Under the wide sweep of its revisional jurisdiction the Court has a dual role to fulfil. One, as a Court of review

examining the decisions of the appellate authority and the Rent Controller on merits; the other, as that of a superior Court exercising the supervisory jurisdiction over the appellate authority and the Rent Controller. In the former role, the correctness and the legality of the Rent Controller's order are properly revisable by the High Court. The responsibility of a Rent Controller is a special one, and it has to be discharged strictly in accordance with the statute. Besides any order that he passes has serious consequences for the parties before him. There can therefore be no question of his doing less than what he is capable of doing and less than what the statute expects him to do. This means and implies that he cannot be adopting any labour-saving devices in composing his orders. He cannot shirk mental work. Nor can he skip his findings, driving the litigants and the superior Courts alike to probe the unknown recesses of his mind and blunder their may into assigning some meaning, or any meaning, to his orders. [*Para.* 30.]

Held that the order in the present case failed to live up to the strict requirements of section 10 (3) (*e*) because the order did not show that the eviction had been ordered on the basis of the Rent Controller's satisfaction that the landlord's claim was *bona fide*. The order was thus a nullity.

Cases referred to:—

Amriteswari Debi v. *Secretary of State,* (1897) I.L.R. 24 Cal. 504; *K. K. Chari* v. *R. M. Seshadri,* (1974) 1 S.C.J. 17: (1974) 1 An.W.R. (S.C.) 14: (1974) 1 M. L. J. (S. C.) 14: (1973) 1 S.C.C. 761: (1973) 3 S.C.R. 691: A.I.R. 1973 S.C. 1311; *Nagindas* v. *Dalapatram,* (1974) 2 S.C.J. 21: (1974) 2 S.C.R. 544: (1974) 1 S.C.C. 242: A.I.R. 1974 S.C. 471; *Bahadur Singh* v. *Muni Subrat Dass,* (1969) 2 S.C.R. 432; *Penchey Property Corporation* v. *Rabinson;* (1966) 2 All E.R. 981; *Ferozi Lal* v. *Man Mal,* A.I.R. 1970 S.C. 794; *Kaushalya* v. *K. L. Bansal,* (1969) 2 S.C.J. 145: (1969) 2 S.C.R. 1048: A.I.R. 1970 S.C. 838; *Babu Ram Sharma* v. *Bal Singh,* (1959) 1 Punj.L.R. 33; *Anisminic Ltd.* v. *Foreign Compensation Commission,* (1969) 2 A. C. 147; *Reg* v. *Governor of Brixton Prison, Ex Parte Abman,* 1968 A.C. 192.

Petition under section 25 (1) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as amended by Act XXIII of 1973, praying the High Court to revise the order of the Court of Small Causes (III Judge), Madras, dated 24th December, 1976 and made passed in H.R.A. No. 79 of 1976 and M.P. No. 698 of 1976 (H.R.C. No. 60 of 1974, Court of Small Causes, VII Judge, Madras).

P. K. Gopalraj, for Petitioner.

T. R. Venkatesan and *P. Paulraj,* for Respondent.

The Court delivered the following

JUDGMENT.—This revision is under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. It is brought by the tenant of a non-residential building in Madras City. What he is up against is an order of eviction passed by the Rent Controller on a petition filed by the landlord for personal occupation of the premises. The Rent Controller passed the order *ex parte*. And it was confirmed in appeal.

2. The validity of the *ex parte* eviction order is questioned in this revision. Mr. Govind Swaminathan appears for the tenant. He argues that the order is a nullity.

3. The nullity argument, as elaborated by learned counsel, was not so much on the *ex parte* nature of the order as on the terms of the order itself. Mr. Govind Swaminathan did not for instance, say that under the Act all *ex parte* orders must be held to be nullities. Nor did he claim that this particular proceeding setting his client *ex parte* was not warranted by the circumstances. This latter ground could not, in any case, have been advanced in the present proceedings pursued by the tenant for getting the *ex parte* order set aside, his

plea of "sufficient cause" failed to carry conviction with the Rent Controller as well as the higher tribunals.

4. This revision, then, has been argued accepting the position that the Rent Controller acted aright and within the law when he set the tenant *ex parte* and proceeded to dispose of the eviction petition in his absence. Even so, according to the argument, the order of eviction is a nullity.

5. Mr. Govind Swaminathan invited me to read the order first, before he addressed his criticism on it. The order, as it happens, is a short one. It is reproduced below, verbatim:

> "Respondent absent. No representation. Set *ex parte*. P.W. 1 examined. Eviction ordered with costs".

Learned counsel, if I remember right, said something unflattering about the brevity of the order. But that could only have been an aside. He did not mean to say that because the order was short, the law must, on that account, regard it as nasty and brutish. I myself could hardly abide the order's staccato prose. And I think I said that judicial writing has no business to be telegraphic. But Mr. Govind Swaminathan did not adopt this line of argument either. His client, evidently, had no mind, at the moment, to indulge in literary criticism. His grievance was much more substantial. Here was a case, learned counsel, said, where the Rent Controller's jurisdiction was invoked to evict a tenant with a view to accommodating the landlord in the premises. The jurisdiction in such cases and the manner of its exercise are clearly drawn in the Act by section 10 (3) (*e*). Eviction of a tenant, under this provision, can be ordered only if the Rent Controller were "satisfied" that the landlord's claim in that regard is "*bona fide*". The section, according to Mr. Govind Swaminathan, makes the Rent Controller's satisfaction a necessary pre-condition on the fact of which, and on the foot of which alone, an order for eviction can properly follow. Now, what is the position in the present case asked learned counsel, turning to the order in question. All we gain from it, he said, is the knowledge that the Rent Controller set the tenant *ex parte* for non-appearance and went on to record such evidence as P.W. 1 gave in the witness box. Beyond these, the order says nothing except to announce, abruptly, that the tenant is ordered to be evicted. It does not say that eviction was being ordered because the Rent Controller was satisfied that the landlord's claim was *bona fide*. The result, according to Mr. Govind Swaminathan, is that his client was evicted contrary to the provisions of section 10 (2) (*e*) of the Act. He was evicted in the absence of the statutory condition, the presence of which alone could have given validity to the order. In this sense, learned counsel said, the order was a nullity.

6. Mr. Kesava Iyengar, appearing for the landlord, supported the order. He said that the order was as valid as valid it can be. In judging its validity, he cautioned, one must not forget that it had been rendered in an *ex parte* proceeding. In a proceeding of this kind, he said, one starts from the position that the Court has to get on with the case before it in the absence of the party against whom relief is claimed. In such a situation, the evidence let in by the only party in attendance before the Court not only goes uncontradicted, but constitutes the only evidence in the case. Necessarily, therefore, it is that evidence to which one must attribute the Court's decision, for there is nothing else on record on which the Court could have addressed itself. Learned counsel urged me to adopt this approach as the right one for judging the validity of the present order of the Rent Controller. He added that it is no defect at all that the order contains little or no discussion about the evidence in the case. This omission, according to him, can be made good by a reference to the transcript of evidence, which is there on record for all to see. Learned counsel pointed out that this was precisely the course which the appellate authority had adopted while hearing the appeal against the order. It went through the papers, on its own, to find out if the order of the Rent Controller

accorded with the evidence which he had recorded from P.W. 1. Learned counsel invited me to do likewise. He cited the example of a Privy Council case in *Amriteswari Debi* v. *Secretary of State*[1], to show that the evidence on record may be referred to for construing a decree.

7. I do not however, feel impelled to go into the evidence of P.W. 1 for deciding the question before me, which is, whether the order as passed by the Rent Controller is a valid order or a nullity. The Privy Counsil case, it may be observed, had to do with the construction of a decree whose validiy, as far as I can see from the reports, was not in question. The problem that arose in that case was rather one of trying to understand the precise scope of a term in the decree. It was in that context that the Privy Council permitted itself a peep into the evidence on record. The problem before me in this case, however, is quite different and is more fundamental. What falls for my decision is the very validity of the order itself. The line of inquiry, is not what the order means, but whether it is an order at all, within the contemplation of the law? To that inquiry I shall address myself immediately.

8. Section 10 (3) (*a*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 makes provision for eviction of tenants in cases where the landlord requires the building for his own occupation. Sub-clauses (i) to (iii) lay down the particular circumstances under which a landlord can ask for eviction of the tenant. Sub-clause (i) deals with residental buildings; sub-clause (ii) deals with non-residential buildings which are meant, or actually used, for stationing vehicles; sub-clause (iii) deals with other non-residential buildings. It is the last sub-clauses which has relevance to the present. discussion. For it is under this sub-clause that the eviction petition in the present case had been filed by the landlord against the tenant. There is no dispute as to what the requirements of this provision are for maintaining an eviction petition before the Rent Controller. It may be that the language of this sub-clauses, as compared with sub-clauses (i) and (ii) is susceptible of a narrow, literal, interpretation, but it is the common acceptation of lawyers and Court that this provision, like the two other follow provisions in the same sub-section, lays down two indisputable conditions for an eviction petition. The landlord must be in need of the premises under the tenant's occupation for the purpose of his own business or that of a member of his family. This is the first requisite. The other is that the landlord has no other non-residential building of his own elsewhere in the same city, town or village concerned.

9. The Legislature having laid down what the requisites are of an eviction petition, proceeds further and lays down how, and in what manner, the Rent Controller should deal with the landlord's claim and give it a proper disposal. This latter provision is enacted in section 10 (3), (*a*) of the Act and is in the following terms:

> "The Controller shall, if he is satisfied that the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting application".

10. My reading of the provisions of sections 10 (3) (*a*) (iii) and 10 (3) (*e*) is this. When a landlord files a petition to evict the tenant of a non-residential building, naturally the Rent Controller will first examine whether the petition satisfied the two initial requirements, one, that the landlord is badly in need of the buildings for carrying on his business, and two, that he has no other building which he can call his own elsewhere in the same city. If these requirements are not fulfilled, the petition for eviction fails then and there at the initial stage. But the jurisdiction of the Rent Controller is not cut out by the terms of section 10 (3) (*a*) (iii) alone. For we also have in the enact-

1. (1897) I.L.R. 24 Cal. 504.

ment section 10 (3) (*e*), and it is in that provision that we find the real crux of the Rent Controller's jurisdiction. The language in which this jurisdiction is defined by the Legislature is too elaborate to need further elucidation. The Legislature has made it quite clear that the Rent Controller has to act only according to the dictates of this clause. He cannot act in any other way. No latitude or discretion is permitted to him. He certainly has jurisdiction to allow the eviction petition and direct the tenant to put the landlord in possession of the premises. But this he can do only on one condition, namely, that he is satisfied that the landlord's claim for relief is *bona fide*. Not otherwise. If in the case before him, the Rent Controller is not satisfied that the landlord's claim is *bona fide*, then this clause in the section insists that he shall reject the eviction petition. The real foundation for the Rent Controller's order, then, is the formation of his satisfaction, one way or the other, on the question of the landlord's *bona fides*. He cannot either allow or reject the eviction petition without forming this satisfaction.

11. In my view, the order in the present case fails to live up to the strict requirements of section 10 (3) (*e*) because the order does not show that eviction had been ordered on the basis of the Rent Controller's satisfaction that the landlord's claim is *bona fide*.

12. I do not accept Mr. Kesava Iyengar's argument that the Rent Controller's satisfaction is implicit in his order. On the written text of the order which I have earlier reproduced verbatim, I do not think it is possible to read any such implication into it. The Rent Controller merely says "Evidence of P.W. 1 recorded. Eviction ordered". What does he mean by this? Putting two and two together, we may possibly imply that the Rent Controller accepted the evidence of P.W. 1. We may, perhaps, go a little farther too and say that according to the Rent Controller P.W. 1's evidence made out the grounds which had been set out in the eviction petition. But even this liberal construction would fall short of what the section expects and requires the Rent Controller to find. Giving to the order the most charitable interpretation one can gave and reading into it every implication that its language reasonably bears, we would still be left with the position that the order does not show what the Rent Controller thought about the landlord's *bona fides* or, what is worse, whether he thought about them at all.

13. Mr. Kesava Iyengar said there is no magic in the words "satisfied", "*bona fides*" etc. and these words can be easily played up in legal discussion and be given a significance far greater then what the Legislature had intended to impute to them. I agree that we must guard against statutory expression being debased and reduced to claptrap. But that is not the case here. The expressions which are the subject of the present discussion are terms whose precise legal attributes no lawyer can miss. That is the very reason why the legislative draftsman has used them in the section. Take the term "satisfied". For a Court or tribunal to be satisfied about something it is essential that it should have applied its mind to that subject. In this sense, satisfaction is a mental thing. But it is implicit in our Court system that the Court's satisfaction, in order to be recognisable as such, must always and ever find verbal expression. Otherwise, how on earth is one to know whether there has been any satisfaction at all and if so what, in the mind of the Court?

14. The significance of the other statutory expression "*bona fide*" cannot also be missed. It has a distinct connotation in legal writtings. In the context of section 10 (3) (*e*) dealing with the jurisdiction of the Rent Controller the phrase has a special significance. The provision demands that the landlord's claim must be held to be one made in good faith. His prayer before the Rent Controller is statedly for an order directing the tenant to put him in possession and it is statedly addressed for a particular purpose, to wit, his pressing need for accommodation of his own business in those very premises. In this context the question of *bona fides* lies in this: that the landlord does not desire the removal of the tenant

as an end itself, but only as a means to an end. It is on this aspect on which the Act requires the Rent Controller to dwell and form his own satisfaction.

15. All this shows that a Rent Controller cannot sustain an eviction order on the basis, merely, of what the landlord or his business manager says from the witness-box. Apart from testing the capacity of the witness, the Rent Controller must also see whether the landlord's move is not just a device to kick the tenant out. He must see whether the landlord really means business and wants it to be set up in, or shifted to the premises in question. In the very nature of the inquiry, therefore, these impressions have got to be put down in writing by the Rent Controller himself, while passing the order. They are not things which can be filled in according to the fertility of the reader's imagination.

16. Mr. Kesava Iyengar pleaded that this would be too high and meticulous a standard from which to test an *ex parte* order. But we are not here examining the Rent Controller's order as a piece of judicial writing. What we are doing, and have to do, is to see whether the order is a valid one under section 10 (3) (*e*). I search in vain this provision to find whether it has made any reservations for *ex parte* orders. It has not; it follows, therefore, that *ex parte* order or no *ex parte* order, the Rent Controller must enter in it what kind of satisfaction he has formed on the question of the landlord's *bona fides*. If the order lacks this finding, then it is no order at all under section 10 (3) (*e*). This direction of our present inquiry is not one of review in which all we do is to go into the correctness of the order. Our present quest is to see whether what the Rent Controller has written is an order at all within the contemplation of section 10 (3) (*e*). There can be no two answers to this question: It is plain to me, at any rate, that the Rent Controller has not given a moment's thought to the considerations bearing on the exercise of his jurisdiction. He seems to have acted under some kind of conditioned reflex which is not an uncommon experience to lawyers familiar with *ex parte* proceedings. The order, as it reads, is a fine example of what may be called automatic writing of the writer's mind not entering what he writes about. I have, therefore, no hesitation in holding that the order is no order at all, and is a nullity.

17. Mr. Kesava Iyengar in the course of his arguments drew my attention to the relevant statutory rules bearing on the subject. I have studied them. There is nothing I can find in those provisions which militates against the conclusion which I have reached in this case. The rules merely lay down the stage by stage procedure which the Rent Controller has to adopt in proceedings that come before him. They do not lay down what the Rent Controller should say and what he may leave unsaid in his orders. These things, as I have earlier shown are dealt with by the sections in the Act. And what the sections lay down cannot, obviously, be whittled down by any subordinate rules. Indeed, on my reading, they make no such attempt. They rather tend to underline my view that every order which the Rent Controller passes must come forth as a speaking order, giving expression to what the statute requires him to be satisfied about, in the particular proceeding before him. The rules cited by Mr. Kesava Iyengar, no doubt, provide for *ex parte* decision-making, as well as the procedure for setting it aside. But even these provisions do not—as, indeed, they cannot—water down the statutory imperative that the Rent Controller shall not evict a tenant without first entering his satisfaction, formed on the materials before him, that requisite grounds exist in the case warranting the eviction.

18. Mr. Kesava Iyengar then submitted that no appellate or revisional authority can ever be at a loss to find out if the appropriate statutory grounds existed for the making of any given order of eviction. He said this would be the position even in a case where the order of the Rent Controller does not speak out his mind. Learned counsel instanced cases of eviction proceedings which at one stage or another end in compromise. The parties in such cases would ordinarily reduce the terms of their settlement in writ-

ing, file their joint memorandum in Court and invite the Rent Controller to pass orders in terms thereof. Where, under those terms, the tenant agrees to vacate the premises, the Rent Controller simply records the compromise and orders eviction. Necessarily, in such cases, the Rent Controller would not be found taking the trouble of recording his own individual judgment as to the existence of the precondition for the tenant's eviction. Mr. Kesava Iyengar said that the latest trend of cases reported in the books is to uphold the validity of such compromise eviction orders, despite their not being "speaking orders" in any proper sense of the terms. He cited two recent decisions of the Supreme Court as instances in point. One is reported as *K. K. Chari* v. *R. M. Seshadri*[1], and the other *Nagindas* v. *Dalapatram*[2]. He drew from these two decisions a broad principle which he formulated in the following terms: If at the time of passing the order, there was some material before the Rent Controller on the basis of which he could be satisfied, *Prima facie,* about the existence of a statutory ground for eviction, then a Court of review must presume that the Rent Controller was, in fact so satisfied.

19. It may be observed that in each of the Supreme Court decisions relied on by Mr. Kesava Iyengar, what was under examination was an order of eviction passed on the basis of a compromise between the landlord and the tenant. Neither decision had to do with an *ex parte* order of eviction of the kind we have to contend with in the present case. The Court had accordingly, no occasion to express itself on the relevant legal position. But Mr. Kesava Iyengar urged that the rule laid down in those decisions must unquestionably apply even for testing the validity of an *ex parte* order which does not, *ex facie,* manifest the Rent Controller's satisfaction as to the existence of the statutory requisites for the tenant's eviction from the premises.

20. Learned counsel's argument involves a consideration of what the Supreme Court, has laid down in those two cases. But before proceeding to do so, I may briefly touch on the earlier trend of authority, or rather, on how it was commonly understood. To begin with, it may be observed that all the cases which ultimately found their way to the High Courts and the Supreme Court had one thing in common. They called for the interpretation and application of special legislation meant for regulating the letting of residential and non-residential buildings in urban, and other cases and the prevention of unreasonable eviction of tenants therefrom. Jurisdiction in such cases was vested by the Legislature in special tribunals or was subjected to special conditions and restrictions even where it was allowed to continue with the common law Courts. The terms of building teramcies were taken out of the realm both of contracts and of the Transfer of Property Act. It was also a common provision to be found in this class of legislation that the eviction of tenants could be ordered only where the tribunal or the Court, as the case may be, was satisfied about the existence of grounds to justify the eviction—the grounds being clearly drawn and defined in the statute itself. What is more, to ensure that the special tribunals exercised their jurisdiction in this regard properly, the concerned legislation also usually provided for a revision or other proceedings for review by a superior Court. Cases thus arose often before the High Courts in the country under one or other of the rent control statutes, and learned Judges were asked to examine the validity or propriety of individual eviction orders. The trend of decisions as might be expected, of the superior Courts was to insist on the Rent Control tribunals passing orders of eviction in terms of the relevant statute and on nothing else. Orders were closely examined by learned Judges to see to what extent the tribunals below had recorded their findings as to the existence of the statutory grounds for eviction in the disputes that came up for decision before them. In this situation, it came to pass that the higher

1. (1974) 1 S.C.J. 17: (1974) 1 M.L.J. (S.C.) 14: (1974) 1 An.W.R. (S.C.) 14: (1963) 3 S.C.R. 691: (1973) 1 S.C.C. 761: A.I.R. 1973 S.C. 1311.
2. (1974) 2 S.C.J. 21: (1974) 2 S.C.R. 544: (1974) 1 S.C.C. 242: A.I.R. 1974 S C. 471.

Courts were invited to go into a particular kind of orders which, though not unfamiliar to lawyers and Courts, yet raised peculiar problems concerning their validity in the context of the special provisions of rent control enactments. I refer to proceedings where the landlord and tenant, either before or after a contest, preferred to compromise their dispute, but insisted nevertheless on getting the *imprimatur* of an order from the tribunal concerned. In such cases, where the tenant agreed, under the compromise, to vacate the premises, the tribunal seldom refused the invitation to pass an order of eviction, without further orders, on the basis of the compromise. One view of such orders was that they were perfectly valid even under the special statute. The other view was that they were not. Surprising as it may now seem, the broad trend of certain early decisions of the Supreme Court was to the effect that an order of eviction which is based solely on a settlement or compromise between landlord and tenant cannot be regarded as one passed in terms of the statute. That, at any rate, was the impression they gave. The earliest of the case was *Bahadur Singh* v. *Muni Subrat Dass*[1]. That case was concerned with a dispute between the tenants of a building and the landlord's son, which was ultimately referred to arbitration. The arbitrator entered on the arbitration and gave his award in due time. The award provided that the tenants should remove the machinery which they had installed in the premises, and give vacant possession to the landlord on a certain date. The award was filed before the Court and a decree was passed in terms of the award. The decree-holder then applied for execution. The tenants objected on the ground that the decree passed by the Court was a nullity. They raised the objection that it contravened section 13 (1) of the Delhi and Ajmer Rent Control Act, 1952. That section prohibited the Court from passing a decree or order for recovery of possession of any premises in favour of the landlord against a tenant except in any suit or proceeding instituted by the landlord against the tenant for recovery of possession on the grounds stated in the Act, and unless the Court was satisfied that a ground of eviction existed. The Supreme Court held that the decree in that case was a nullity. For two reasons: one, that the decree was passed in a proceeding to which the landlord was not a party, and two, that the Court had passed the decree without satisfying itself that a ground for eviction existed. The Supreme Court held that on the plain wording of section 13 (1) of the Delhi and Ajmer Rent Control Act, 1952, the Court was forbidden to pass a decree otherwise. In the course of their judgment, the learned judges derived support from a decision of the English Court of Appeal in *Penchey Property Corporation* v. *Rabinson*.[1] That was a case where the landlords of a flat had issued a writ to recover possession from the concerned tenants for non-payment of rent. The tenants did not enter appearance in the case and the Court gave judgment in favour of the landlord in default of the tenant's appearance. The Court of Appeal had to consider whether the judgment was in accordance with the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 as applied to the Rent Act, 1965. Section 3 (1) of the former Act provided that "no order or judgment for the recovery of possession of any dwelling house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given *unless the Court considers it reasonable to make such an order or give such a judgment......*" The Court of Appeal held that the judgment given by the Court of first instance in default of appearance of the tenants was a nullity. The reason for this view finds expression in the judgment of Winn, L.J., who spoke for the Court of Appeal.

> "It is perfectly plain from what I have said that before the judgment in default of appearance was entered, no Court had determined whether it was reasonable to make such an order or give such a judgment. In my view, there-

1. (1969) 2 S.C.R. 432.

1. (1966) 2 All E.R. 981.

fore, by express force of that section the judgment in default of appearance here was a nullity. It was, according to its terms, a judgment for recovery of these premises, and that is something which the section prohibits unless there has been prior determination by the Court that it was reasonable to give such a judgment".

21. The above passage was quoted with approval by the Supreme Court in the decision, *Bahadur Singh* v. *Munni Subrat Dass*.[1] It may be observed that while in the case before the English Court of Appeal, the order of eviction was an *ex parte* order passed in default of appearance by the tenants, the Supreme Court was concerned with a decree passed by a Court on the basis of an arbitration award without the Court itself going into the grounds of eviction. In both the cases, the Court of first instance was found not to have exercised its mind to form its own satisfaction about the precise ground on which alone eviction could have been ordered under the relevant statutory provisions.

22. The Supreme Court took the same view in two later decisions. *Ferozi Lal* v. *Man Mal*[2] and *Kaushalya* v. *K. L. Bansal*.[3] Hegde, J., speaking for the Court in the latter case observed thus:

"From the facts mentioned earlier, it is seen that at no stage, the Court was called upon to apply its mind to the question whether the alleged subletting is true or not. Order made by it does not show that it was satisfied that the sub-letting complained of has taken place, nor is there any other material on record to show that it was so satisfied. It is clear from the record that the Court proceeded solely on the basis of the compromise arrived at between the parties. That being so, there can hardly be any doubt that the Court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity".

1. (1969) 2 S.C.R. 432.
2. A.I.R. 1970 S.C. 794.
3. (1969) 2 S.C.J. 145 : (1969) 2 S.C.R. 1048 : A.I.R. 1970 S.C. 838.

23. It might have been noticed that Hegde, J., in the above said decision had not said that all orders of eviction passed in terms of compromises arrived at between the parties must be regarded as nullities. There might be cases where either within the four corners of the memorandum of compromise or elsewhere from the record it might be possible to deduce the existence of the statutory grounds for eviction. Hegde, J., does not seen to have regarded as invalid orders passed by the tribunals on the basis of compromise terms in such cases. Yet a general impression appears to have gained ground among lawyers that orders of eviction passed by a tribunal on the basis of agreement between the parties must be held to be invalid on the score that the very presence of an agreement between the parties must, *per se*, rule out the existence of satisfaction which the statute requires the tribunal to find as pre-condition for eviction.

24. The opportunity for clarifying the position of compromise eviction orders under the scheme of rent control statutes soon presented itself before the Supreme Court in *K. K. Chari* v. *R. M. Seshadri*.[1] In that case, the landlord of a residential building in Madras City moved the Rent Controller for evicting the tenant. The petition was filed under the Madras Buildings (Lease and Rent Control) Act, 1960. The tenant in that case was a retired I.C.S., officer and a practising advocate. The ground for eviction put forward by the landlord was that he had no other building in the City and he required the building for his personal occupation. The petition was resisted by the tenant. The parties having joined issue, the landlord let in evidence, both documentary and oral, in support of his petition. The tenant, however, did not choose to cross-examine the petitioner's witnesses. Subsequently, the parties entered into a settlement, and filed a memorandum of compromise before the Rent Controller under the terms of which the tenant withdraw all his defences to the petition and submitted to a decree for eviction. The

1. (1974) 1 S.C.J. 17 : (1973) 1 S.C.C. 761 : A.I.R. 1973 S.C. 1311.

Rent Controller passed an order in terms of the compromise. The question before the Supreme Court was whether this order for eviction, passed as it was on the terms of a compromise, should be held to be a nullity on the basis of the ruling of the Supreme Court in *Bahadur Singh* v. *Munni Subrat Dasi*[1] and the two later decisions following it. Both the learned Judges, Vaidialingam, J., and Alagiriswami, J., who heard this case, gave separate but concurring judgments. Vaidialingam, J., referred in his judgment to the averments in the eviction petition, the salient points made out in the evidence on the side of the landlord, the terms of the compromise memo and the course of proceedings a whole. Having done so, he observed that it cannot be held in the particular circumstance of that case that the eviction order had been passed solely on the basis of the compromise entered into between the parties. According to the learned Judge, it was "clear from the various matters referred to, that the Court was satisfied about the *bona fide* requirement of the landlord. Therefore, the decree for eviction is neither void nor in executable".

25. Having decided the case before the Court on the basis of its attendant circumstances, Vaidialingam, J., proceeded to lay down the position, somewhat generally, thus: If the tribunal had expressed its satisfaction in the order itself, that will conclude the matter. That the tribunal was so satisfied can also be considered from the point of view whether a stage had been reached in the proceedings for the tribunal to apply its mind to the relevant question. Other materials on record can also be taken into account to find out if the tribunal was not satisfied.

26. The other learned Judge, Alagiriswami, J., began by giving a brief rendering of the reasonings of his learned colleague. He did so in the following passage:

> "He (Vaidialingam, J.), has also pointed out that the true position appears to be that an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact, *viz.*, the existence of one or more of the conditions mentioned in section 10 were shown to have existed when the Court made the order, that the satisfaction of the Court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding; and that if at some stage the Court was called upon to apply its mind to the question and there was sufficient material before it before the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was based. He has further pointed out that if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry. It is on these grounds that he has come to the conclusion that the facts in this case satisfied these tests".

27. Having traced the various steps is Vaidialingam, J.'s reasoning in the manner aforesaid, Alagiriswami, J., wholly agreed with his learned colleague's conclusion, observing that 'in so far as it is necessary for the purposes of this case, this is a satisfactory conclusion". It, however, seemed that Alagiriswami, J., very much wished to restate the position in a more general way and for a wider application since according to him, the law on the subject had got into a labyrinth and the time had come for taking a hard look at it. He also seemed to have gone some way in the direction of a restatement of the whole law on the subject of compromise eviction orders. Quoting at some length a passage from a decision of the Punjab High Court reported as *Babu Ram Sharma* v. *Bal Singh*[1], the learned Judge seemed inclined to take the view that an eviction order based on a com-

1. (1969) 2 S.C.R. 432.

1. (1959) 61 Pun.L.R. 33.

promise would be a valid order, if in the concerned eviction petition the landlord had asked for possession on any one of the grounds on the basis of which he could have asked for possession under the statute. The learned Judge, however, did not offer any final views of his own on the matter, observing: "This would, however, have to be considered when a proper occasion arises".

28. That occasion, apparently, arose before the Supreme Court very soon in *Nagindas* v. *Dalpatram*[1]. Sarkaria, J., who gave the decision of the Court, seemed to have discovered a general thread of principle running right through in the earlier cases. He observed:

"From a conspectus of the cases cited at the bar, the principle that emerges is: that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be *prima facie* satisfied about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied".

29. It is the above passage from the judgment of Sarkaria, J., which Mr. Kesava Iyengar has heavily relied on. He said that the rule laid down by the learned Judge must apply to every case of eviction order passed by a Rent Controller which does not *ex facie* manifest the tribunal's satisfaction as to the existence of the statutory ground for eviction. The order in question may have been passed on the basis of a settlement between the parties. Or it may have been passed *ex parte* in the absence of the tenant, and after recording the evidence of the landlord. In every case, according to Mr. Kesava Iyengar, the question would be one of finding out whether there was some material or other on record to which the tribunal's decision could reasonably be attributed and which could be held to have made out one or other of the grounds set out in the Act as a lawful ground for eviction. This, according to learned counsel, is what *Nagindas* v. *Dalpatram*[1], has laid down in unmistakable terms.

1. (1974) 2 S.C.J. 21: A.I.R. 1974 S.C. 471.

30. I do not agree with Mr. Kesava Iyengar's understanding of the ruling in the above case. In my view, Sarkaria, J., in the passage relied on by learned counsel, was minded only to summarize what he considered to be the conspectus of the earlier rulings of the Supreme Court. It will be remembered that all those rulings dealt with only one class of cases, namely, cases of compromise, in which the tribunal or Court, as the case may be, was found issuing eviction orders without recording its own finding as to the existence of the relevant statutory grounds for eviction. Not one of those earlier decisions had to deal with an *ex parte* eviction order suffering from a similar shortcoming. The case in *Nagindas* v. *Dalpatram*[1], itself was yet another instance of a compromise order of eviction. It seems to me, therefore, reasonable to understand the law stated by Sarkaria, J., to be limited in its application to compromise orders of eviction. There are clear indications in the very judgment of the learned Judge to indicate that what he had in mind was only consent orders. The learned Judge made it perfectly clear in his judgment that there must be materials on record on the basis of which alone the tribunal, in any given case, might be held to have been satisfied about the existence of the statutory grounds for eviction. In the absence of much materials, it cannot be so held. And, adverting to the question as to what kind of materials might possibly lead to such an inference, the learned Judge cited the compromise memo itself as one such material. Compromise, he said, must be based on an implied admission, and, so treated, can be accepted as the best evidence of the facts admitted. It was in this sense that the learned Judge upheld the compromise order in that case as having been validly made.

31. The position in the present case is wholly different. The grounds set out by the landlord in its eviction petition are by no means admitted anywhere by the

1. (1974) 2 S.C.J. 21: A.I.R. 1974 S.C. 471.

tenants. On the contrary, they are seriously controverted. It may be mentioned, at this stage, that although the Rent Controller set the tenant *ex parte,* it was not before the tenant had entered appearance and filed his affidavit in opposition in the Court. A reference to this affidavit shows not only a denial of the landlord's averments, but also a positive assertion by the tenant that the claim made in the petition was not *bona fide*. I cannot, therefore bring myself to construe the eviction order in this case as based on any statutory grounds of eviction, merely on the score that the petition quotes the statute. On the contrary, as pointed out by Mr. Govind Swaminathan, there is a clear indication in the record itself to show that before ordering eviction the Rent Controller did not even advert to the pleadings of the landlord, let alone evaluate the evidence of P.W. 1. The petition was avowedly made under section 10 (3) (*a*) (iii) of the Act. This means that the landlord, in order to claim relief, had to plead, *inter alia;* that it had no other building in the city or town concerned. The non-residential building in question in the case is situate in Madras City. But, curiously enough, the landlord sought to maintain its petition not on the ground that it had not other non-residential building in the city, but on the ground that it had no other similar building in Malayaperumal Street, in which the building under tenancy is situate. Mr. Govind Swaminathan observed that this is a fatal shortcoming in the landlord's petition, This woeful inadequacy in the pleading, he said, could have caught even the eye of a man running. That the Rent Controller after going through the notions of an *ex parte* hearing, had passed the eviction order in the face of this state of the pleading is positive proof, according to learned counsel, that he was wholly oblivious to every thing on record—Pleadings, materials and what not. I am inclined to agree with him. I have earlier explained in some detail my reasons for holding this order to be *null* and *void*. As may be seen, I have derived my conclusion by reference to the mandatory provisions of section 10 (3) (*e*) and by looking at the mere aspect of the order, without more. What Mr. Govind Swaminathan has now submitted provides additional grist to the mill, as it were, from a source external to the order itself. That the order finds no support in the landlord's own pleadings only underlines the conclusion that it is a nullity.

32. Mr. Kesava Iyengar lastly urged that the order under revision cannot be regarded as a nullity in the true sense of that expression. He said that only where an order is passed in total absence of jurisdiction, or in excess of jurisdiction, would the law regard it as a nullity. Learned counsel reminded me that in this case the Rent Controller was admittedly seized of the matter, and had undoubted jurisdiction to issue the order. There was, therefore, no scope for considering it, in terms of its being a nullity.

33. I do not agree with the above submission. Early conceptions of nullity amongst lawyers were based on the jurisdiction aspects of the proceedings or orders in question. Recent advances in jurisprudence, however, show that even where the tribunal or Court has undoubted jurisdiction to pass orders, they can yet be challenged as nullities for quite other reasons. Some of them are set out in a recent decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*[1]. The following passage from the judgment of Lord Reid represent the current thinking on the subject:

> "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some ques-

1. (1969) 2 A.C. 147.

tion which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on such matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive".

34. Lord Pearce in the same case made the following further observation:

"Lack of Jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the Tribunal having any jurisdiction to embark on an inquiry. Or the Tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the Tribunal may depart from the rules of natural justice or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decisions to be a nullity."

Mr. Kesava Iyengar submitted that it would be a misuse of the expression to dub as nullity an order passed by a tribunal having jurisdiction, merely because it had passed a wrong order. He added that a tribunal or Court having jurisdiction has a right to pass right orders as well as wrong orders, and if the orders are wrong, they can be corrected in appeal or other appropriate proceedings, but by no means can they be regarded as a nullity.

35. Lord Reid, in his judgment above cited, adverted to this aspect in *The Anisminic Ltd.* v. *Foreign Compensation Commission*[1]. He referred to an earlier decision of the House of Lords, and clarified the position thus:—

"I understand that some confusion has been caused by my having said in *Reg.* v. *Governor of Brixton Prison, ex Parte Abman*[1], that if a Tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "Jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings then its decision is equally valid whether it is right or wrong subject only to the power of the Court in certain circumstances to correct an error of law."

I have, therefore, no doubt in my mind that this order of the Rent Controller is, by all standards, a nullity. I approach this question as a Court sitting in revision under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Under that section this Court may on the application of any person aggrieved by an order of the appellate authority, call for and examine the record of the appellate authority, to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to this Court that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly. It seems to me that under the wide sweep of this revisional jurisdiction this Court has a dual role to fulfil: One as a Court of review, examining the decisions of the appellate authority and the Rent Controller on merits; the other, as that of a superior Court exercising supervisory jurisdiction over the appellate authority and the Rent Controller. In the former role, the correctness and the legality of the Rent Controller's order are properly reviewable by this Court. But I conceive the other, supervisory, jurisdiction to be the more salutary one from the point of view of maintaining the tone of the subordinate Courts and Tribunals. I believe that the powers have been specifically conferred on this Court under the section only to ensure that the tribunals, at all lower levels bring to bear a proper judicial bearing and outlook in the discharge of their

1. (1969) 2 A.C. 147.

1. (1968) A.C. 192, 234.

functions under the Act. It is in this context, apart from anything else, that I feel interference is called for in this case. As I said earlier, the responsibility of the Rent Controller is a special one, and it has to be discharged strictly in accordance with the statute. Besides, any order that he passes has serious consequences for the parties before him. There can, therefore, be no question of his doing less than what he is capable of doing and less than what the statute expects him to do. This means and implies that he cannot be adopting any labour-saving devices in composing his orders. He cannot shirk mental work. Nor can be skip his findings, driving the litigants and the superior Courts alike to probe the unknown recesses of his mind and blunder their way into assigning some meaning or any meaning, to his orders. I like to imagine that had the Rent Controller's order's order contained some discussion, be it ever so little, the course of further proceedings in this case might have been different. As it happens, the order has to be declared a nullity, but regrettably enough, only after avoidable expenditure in time, effect and costs.

36. The appellate authority in this case had gone into the evidence itself and sought to support the eviction order on its own perception and evaluation of the evidence. But, as I had explained earlier, when the order is a nullity, there can be no question of supporting its conclusion by reference to the evidence in the case. I must, therefore, regard the appellate order as equally futile.

37. In the result, the Civil Revision Petition is allowed. The order of the appellate authority is set aside and the *ex parte* order of eviction passed by the Rent Controller is declared to be a nullity and set aside. In the circumstances, I make no order as to costs.

R.S. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

R. R. Dalavai .. *Petitioner**

v.

The Government of Tamil Nadu by the Secretary to Government R. D. and L. A. Department, Madras-9 and another .. *Respondents.*

Tamil Nadu City Municipal Corporation Act (IV of 1919), section 100 and rules 2-B, 3 and 3-A of Schedule IV—Levy of property tax—Adoption of plinth area basis—Not valid—Notices regarding revision of assessment to set out reasons—Fair rent formula contemplated by the Rent Control Act, whether can uniformly be applied.

According to the Supreme Court the determination of the annual valuation of property with reference to the floor cannot be justified under the law of rating. Fixing the rate at a percentage of the capital value is not permitted by the Tamil Nadu City Municipal Corporation Act. Hence the property tax cannot be levied under section 100 of the Madras City Municipal Corporation Act on the plinth area basis. The actual basis adopted by the corporation cannot be known unless reasons for the proposed enhancement are given in the special notices contemplated by the rules; the assessing officers should be directed to give reasons for enhancement so that the assessee may know the basis for enhancement. Unless the assessee is told as to what is the reason for the enhancement in the assessment he may not know on what ground the enhancement has been made. In such cases he may not be able to put forward his objections *specifically and effectively*. It is, therefore, clear that the special notices should give reasons for enhancement.

[*Paras.* 9, 12 *and* 13.]

* W.P. No. 604 of 1977. *27th October,* 1977.

In cases where the buildings are not governed by the provisions of the Rent Control Act, there is no question of infringement of the provisions of the Rent Control Act, by the owners receiving whatever rent that is paid by the tenants and, therefore, the actual rent collected by the assessee can be taken as the reasonable rent which the building is likely to fetch. Under the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960, certain buildings fetching rent above a particular limit are not governed by the provisions of the Act and in those cases there cannot be any restriction as to the rents that can be received in respect of the building. Similarly there are certain buildings which have been exempted from the provisions of the said Act. Therefore, the fair rent formula contemplated by the Rent Control Act need not strictly be followed by the assessing authorities in respect of such of those buildings which do not come under or are exempted from the purview of the Rent Control Act. [*Para.* 15.]

Cases referred to:—

Lokmanya Mills Barsi Ltd. v. *Barsi Borough Municipality,* (1962) 1 S.C.J. 123: (1962) 1 S.C.R. 306: A.I.R. 1961 S.C. 1358; *Patel Gordhandas Hargovindas* v. *The Municipal Commissioner,* (1964) 2 S.C.R. 608: (1965) 1 S.C.J. 15: A.I.R. 1963 S.C. 1742; *Corporation of Calcutta* v. *Smt. Padma Debi,* (1962) 3 S.C.R. 49: A.I.R. 1962 S.C. 151; *Guntur Municipal Council* v. *Rate Payers' Association,* (1971) 2 S.C.J. 142: (1971) 2 M.L.J. (S.C.) 7: (1971) 2 An. W. R. (S. C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353; *Delhi Municipality* v. *M. N. Soi,* 1976 R.C.J. 763: (1976) 4 S.C.C. 535: A.I.R. 1977 S.C. 302; *Indore Municipality* v. *Ratnaprabha,* (1976) 4 S.C.C. 622: 1977 R.C.J. 443: A.I.R. 1977 S.C. 308.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* restraining the respondents from levying or revising or collecting the property tax on the land and buildings belonging to the petitioner at No. 83, Big Street, Madras-5 in the City of Madras within this jurisdiction on the illegal basis of their notional value, plinth value (30, 45 or 50 paise per sq. foot) contrary to the express statutory provisions of the Madras City Municipal Corporation Act, 1919 in that regard.

Petitioner in person.

Advocate General, for Government Pleader, for Respondent No. 1.

S. Palaniswamy, for 2nd Respondent.

The Court made the following

ORDER.—The petitioner prays for a writ of *mandamus* from this Court to restrain the respondents herein from levying, revising or collecting the property tax on the land and buildings belonging to the petitioners at No. 83, Big Street, Madras-5 on the basis of its plinth area, contrary to the provisions of the Madras City Municipal Corporation Act, 1919.

2. The first respondent is the State of Tamil Nadu and the second respondent is the Corporation of Madras. According to the petitioner as soon as he came to know that the Corporation of Madras had proposed to revise the property tax leviable on the properties in the City of Madras adopting the plinth area as the basis, he wrote to respondents 1 and 2, as a rate-payer, as the representative of the City Cleaning Campaign, and as the Secretary of the Native Residents' Association of the Madras City, pointing out that the Corporation has no jurisdiction to assess levy or collect property tax on the basis of the plinth area as it would tantamount to levying a tax on the property and not its rental value. The second respondent, however, without giving any reply to the said letter, proceeded to issue a circular purporting to be the guidelines for its executive staff directing that tax should be reckoned at 30 paise per sq. ft. of plinth area for owner occupied buildings and 45 to 50 paise for tenanted buildings. Apprehending that his property also will be assessed to property tax on plinth area basis as per the said guidelines issued

by the Corporation he has approached this Court for the relief aforesaid.

3. A preliminary objection was taken by the respondents to the maintainability of the writ petition on the ground that the petitioner has got alternative remedy to challenge any assessment that may be made on his property. This preliminary objection has been considered and rejected in my order dated 23rd August, 1977. The only question now to be considered is whether the Corporation is adopting plinth area basis for assessment of property tax in the City of Madras as alleged by the petitioner.

4. The petitioner's first contention is that the Corporation has issued guidelines to its executive staff, *i.e.*, the Subordinate Revenue Officers and assessors directing them to reckon the property tax at 30 paise per sq. ft. of plinth area for owner occupied building and 45 to 50 paise for tenanted buildings, that such a mode of assessment is illegal as it is contrary to section 100 of the Madras City Municipal Corporation Act, and that such assessments based on the plinth area have been consistently held to be bad by the Supreme Court and other High Courts. Secondly, it is contended that in any event the rate per sq. ft. suggested in the guidelines is also highly arbitrary, irrational and economically burdensome that the revision of property tax assessment on the above basis has in fact resulted in the half-yearly tax going up by three to five times the existing tax without any justification, that such oppressive assessments will ultimately result in the total annihilation of all property owners in the course of next five years and that therefore, the annual value should be fixed only with reference to the fair rent formula contemplated by the Madras Buildings (Lease and Rent Control) Act, 1960, as has been held in a series of cases by the Supreme Court. Thirdly, it is contended that the proposed revision of property tax being quinquennial, any revision in the annual value can only be for specific grounds such as increase in the area of the building, increase in rent, additions or alterations in the building etc., that the annual value of the building cannot suddenly increase four to five times merely because the assessing authority wants to increase the tax and that in most of the assessments so far made in relation to some properties, the annual value has been increased without giving any specific ground which has occasioned the enhancement of the annual value.

5. The second respondent filed an elaborate counter affidavit and the first respondent has adopted the same. In the counter affidavit filed by the second respondent, it has been specifically stated that it is not levying tax on the basis of the plinth area of the building, that the provisions of section 100 of the Madras City Municipal Corporation Act, 1919, dealing with the method and levy of property tax are being followed strictly and that the procedure followed for the determination of the annual letting value is legal. As regards the petitioner's complaint that the plinth area basis is being or proposed to be adopted, the second respondent states that they have adopted only the annual rental value as the basis, that for determining the annual value, it is true, certain guidelines had been issued but there is nothing repugnant in those guidelines to the provisions of section 100 of the Act or the rules framed thereunder, that such guidelines are necessary as the Act and the Rules are silent as to the manner of arriving at the reasonable letting value, that there was no uniformity of approach in the assessment of similar buildings located in one and the same area, and that the issue of guidelines has facilitated the adoption of a uniform procedure for arriving at the annual letting value. It is said that the buildings are grouped generally into the following four categories and the tax levied at the rate prescribed by the council with reference to section 99 of the Act.

"1.	Annual value Rs. 500/- and below.	I Grade	18½% of the annual value per year.
2.	Annual value above Rs. 500/- but below Rs. 1.000-	II Grade	25½ of the annual value per year.
3.	Annual value above Rs. 1,000/- but below Rs. 5,000/-	III Grade	27½% of the annual value per year.
4.	Annual value above Rs. 5,000-	IV Grade	30% of the annual value per year."

As regards the land which is not appurtenant to any building or which is occupied by or appurtenant to huts, the tax is said to have been fixed at Rs. 8 per ground in pursuance of section 102 of the Act. Where the land is capable of fetching rental income, the annual value is based on the actual rental income from the land without allowing any deduction as the land does not require any maintenance or has no depreciation value.

6. As regards the petitioner's allegation that the quinquennial revision is proceeding on the basis of the guidelines, the respondents state that the quinquennial revision takes place once in five years during January and February of every year, that a special notice is published in the Newspaper after a general revision is done as per rule 2 of the Taxation Rules in Schedule IV of the Madras City Municipal Corporation Act, 1919, that apart from the said special notice published in the Newspaper, individual notices are also served on the owner or occupier of the property, that in respect of other revisions between one revision and another which may arise as a result of the increase in rent, additions and alterations of the building, construction of new buildings, notice under rule 3 in Schedule IV is issued in the first instance to the parties and that after consideration of their objections, if any, another notice called "3-A notice" is issued and served on the individual property owners and their objections considered. It is said that oral hearing also is given. The owners were also given opportunities to go on appeal to the Taxation Appeals Committee against the orders of the Commissioner and to the Court of Small Causes against the decisions of the Taxation Appeals Committee. It is, therefore, contended by the respondents that in cases where revision of assessment is not in accordance with the provisions of the Act, the same could be rectified by invoking the remedies provided in the Act. The respondents also point out that in practice it was considered expedient to guide the assessors in estimating rental values as it was thought that leaving the discretion unfettered would leave it open to abuses or malpractice in which both the Corporation's interest as well as that of the house owners may suffer, that therefore guidelines were issued with the directions that the assessors had to bear in mind the situational advantages, the nature of the area of location of the building like residential areas or commercial areas and other variable factors, that the guidelines were not binding or meant to fetter the assessor's discretion, that they were only intended to achieve a beneficial purpose, namely, to reduce the scope for arbitrariness or capriciousness leading to discrimination and disparity in estimating the rental values, that the guidelines only indicate the result of a study—a broad range of possibilities, that the

assessors have discretion to go beyond the range either way, if an enquiry indicates the basis for doing so and that there is nothing repugnant to the Act or rules in the guidelines.

7. Dealing with the petitioner's contention that the annual value of a building can only be arrived at with reference to the provisions of the Rent Control Act dealing with the fixation of fair rent of buildings, the respondents State that these provisions are not mandatory, that every owner or tenant occupying a building is not under any legal obligation to have the rent of that building fixed under the provisions of that Act, that the fair rent is fixed either at the instance of the tenant or the owner on a specific application being made for the purpose to the appropriate authority, that residential buildings whose rent is more than Rs. 400 do not also come within the scope of the Act at all, that buildings, whether residential or non-residential constructed within five years do not also attract the provisions of the Act, that therefore, it is not possible to uniformly apply the provisions of the Rent Control Act relating to fixation of fair rent in respect of all buildings, that it is also not the intention of the Legislature to apply the fair rent formula to the levy of property tax, that the Madras City Municipal Corporation Act speaks of only expected rent and not actual rent for the purpose of arriving at the annual rental value and that the purposes of the City Municipal Corporation Act and the Rent Control Act being different, the fractional application of the provisions of the Act to another field would create unnecessary complications and will lead to unintended results. It is said that to pick out a particular section or sections of the Act and to apply it to a field different from its own, will disturb the internal consistency, harmony and the scheme of the latter Act, that therefore the Rent Control Act cannot be applied to the levy of property tax and that the levy of property tax has to be done only in accordance with the provisions of the Madras City Municipal Corporation Act, 1919 and not with reference to the Rent Control Act.

8. The respondents state that, in any event on actual practice the Corporation found that the rents fixed with reference to the fair rent formula are always very much higher than those assessed by the Corporation under the Madras City Municipal Corporation Act and that the fair rent formula leads to the tax structure being regressive in incidence as it does not take into account the nature of the structure or the building and the situation and the area in which it is located. As regards the petitioner's complaint that the property owners to whom notices under rules 3 and 3-A are issued are not put on notice of the reasons for revision or enhancement of the tax and that they are completely in the dark as to why and how the revision of assessment is made, the respondents state that forms prescribed under rules 2-B, 3 and 3-A have been in vogue for several years in the past, that forms prescribed that grounds for revision should be mentioned, that the owners are given reasons as to why and how the revision of assessment come to be made at the time of the oral hearing and that they are also allowed to peruse the assessment records to find out the basis for revision. Thus the respondents' stand is that the reason as to why and how the revision of assessment is made need not be stated in the notice issued under rules 2-B, 3 and 3-A.

9. On these pleadings, the following questions arise for consideration:

1. Whether the plinth area basis could be adopted for determining the annual value of buildings?

2. Whether the second respondent has adopted the plinth area basis in making the general revision of assessments?

3. Whether the fair rent formula is to be uniformly applied by the second respondent in determining the annual value of all buildings in the City as urged by the petitioner?

4. Whether the reason as to why and how the revision of assessment has taken place in a particular case should be set out in the notices issued under

rules 2-B, 3 and 3-A of Schedule IV to the Madras City Municipal Corporation Act, 1919?

The first question is no longer *res integra*. It has been held consistently by the Supreme Court that the determination of the annual valuation of the property with reference to the floor area cannot be justified under law of rating. In *Lokmanya Mills Barsi Ltd.* v. *Barsi Borough Municipality, Barsi*[1], the validity of rule 20 framed under section 58 (*j*) of the Bombay Municipal Boroughs Act, 1925, was challenged. In that case the Municipality had resolved to enhance the assessment of lands and buildings within its area by fixing the annual rental value at Rs. 40 for every 100 square feet and gave effect to the said resolution by framing the following rule:

> "*Rule* 20: As regards mills, factories and buildings relating thereto, the annual letting value shall be fixed at Rs. 40 per 100 square feet or part thereof for every floor, groundfloor or cellar and the tax shall be assessed on the said annual letting value, at the ordinary rate."

The Municipality prepared an assessment list under the new scheme of taxation and issued notices of demand calling upon the appellants to pay house-tax and water-tax newly assessed thereon. The assessees filed suits challenging the demand towards property tax. The trial Court held that rule 20 was valid and within the competence of the Municipality and dismissed the suits. The District Court, on appeal, however, declared the said rule as illegal and *ultra vires*. The High Court, disagreed with the District Court and held the rule to be valid. When the matter was taken to the Supreme Court on special leave, the Supreme Court held that the rate to be levied on lands and buildings may be assessed on the valuation of the lands and buildings based on capital or the annual letting value and that the Municipality is enacting rule 20 ignored both the above methods of valuation and had adopted a method not sanctioned by the Act by prescribing valuation computed on the area of the building. In *Patel Gordhandas Hargovindas* v. *The Municipal Commissioner, Ahmedabad*[1], the validity of a rate at a percentage of the capital value of open lands was challenged on the ground that it was contrary to section 73 of the Bombay Municipal Boroughs Act, 1925. This challenge was upheld by the Supreme Court. The Supreme Court has taken the view that though the word "rate" has not been defined anywhere in the Bombay Municipal Boroughs Act, 1925, it was clear that the word has been used to mean a tax on the annual value of lands and buildings, that under the provisions of the said Act the basis of the valuation may either be capital or annual letting value and that there is no basis for adopting the third method of valuation of adopting the percentage of the capital value itself. Referring to the contention advanced by the Municipality that it would make no difference whether the rate is levied at a percentage of the capital value or at a percentage of the annual value arrived at on the basis of capital value by fixing a certain percentage of the capital value as the yield for the year, the Supreme Court expressed that though it is possible to arrive at the same figure for the rate by either of these methods, so long as the law enjoins that the rate should be fixed on the annual value of lands and building, the Municipality cannot fix it on the capital value and then justify it on the ground that the same result could be arrived at by fixing a higher percentage as the rate in case it was fixed in the right way on the annual value. According to the Supreme Court by fixing the rate as a percentage of the capital value directly, the real incidence of the levy is camouflaged, and the vice in the camouflage resulting from imposing the rate at a percentage of the capital value lay in that, the levy may become extortionate or confiscatory, and therefore, fixing of the rate at a percentage of the capital value is not permitted by the Act. In view of the above pronouncements of the Supreme Court, the

1. (1962) 1 S.C.J. 123: (1962) 1 S.C.R. 306: A.I.R. 1961 S.C. 1358.

1. (1965) 1 S.C.J. 15 : (1964) 2 S.C.R. 608: A.I.R. 1963 S.C. 1742.

property tax cannot be levied under section 100 of the Madras City Municipal Corporation Act on the plinth area basis.

10. The next question is whether the second respondent has adopted the plinth area basis in making the general revision of assessments. In the counter-affidavit filed by the second respondent, it has been specifically stated that it is not levying tax on the basis of the plinth area of the building in respect of any of the premises in the city and that the revision of property tax is not being carried out on the basis of any notional rent per square foot. The petitioner would, however, refer to the guidelines for the General Survey of the year 1976-77 as indicating an attempt by the Corporation to adopt the plinth area basis. Paragraph 7 of the said guidelines is as follows:

> "Wherever the actual rental value is not forthcoming, the rental value should be calculated at Rs. 0-30P. in respect of owner occupied premises and Re. 0-45 to Re. 0-50P. in respect of tenant occupied portions, to be reckoned as tax. In other cases, the actual rental value should be adopted. Where the rental value is suspected or where the rental value given is below the value to be reckoned on the basis of sq. ft. method, the latter should be adopted."

This paragraph in the said guidelines proceeds on the basis that wherever the actual rental value is not forthcoming or the rental value reported is suspected to be low, the rental value should be calculated at 0.30P. in respect of owner occupied premises and 0.45 to 0.50P. in respect of tenant occupied portions. It is also pointed out by the petitioner that as no reason for enhancement of the valuation is given in the special notices served on the owners under rules 2-B, 3 and 3-A, it is not possible for the owners to know whether the Municipality has adopted the plinth area basis or not in pursuance of the said guidelines. As against this, the learned Advocate-General appearing for the respondent takes me through the guidelines issued for the year 1977-78 and submits that the plinth area basis has not been adopted and that the officials are merely asked to bear in mind the rental value of the buildings obtained in the city and that it is only for that purpose the rate per square foot has been given. The later portion of paragraph 7 in the guidelines for the year 1977-78 is referred to as indicating that the assessment of any property should be made strictly with reference to section 100 of the Madras City Municipal Corporation Act, and, therefore, it cannot be assumed that the second respondent is making an attempt to make the assessment in contravention of section 100 of the Act. Having regard to the definite stand taken by the respondents that the assessment of property-tax has not been done in any case on the basis of the plinth area and that they have no intention to adopt that method, it is not possible for this Court at this stage to issue any direction in that regard. The learned Advocate-General fairly concedes that if it is shown in a given case that the plinth area basis has been adopted, that assessment will have to be quashed as and when challenged.

11. In this case, the petitioner has not been able to produce any assessment made by the officers of the second respondent adopting the plinth area basis. But the petitioner would say that all the assessment orders so far made enhancing the property-tax have been camouflaged in such a way that the reason for enhancement cannot be known by the assessees, that it is not possible for any one to say whether the second respondent has actually adopted the plinth area basis or not, that unless the reasons for enhancement are given in the special notices contemplated by the Rules, the actual basis adopted by the Corporation cannot be known and, that therefore, the assessing officers should be directed to give reasons for enhancement so that the assessee may know the basis for enhancement. In this connection, the petitioner refers to Volume I of Halsbury's Laws of England (Administrative Law) IV Edition, page 92, paragraph 75 which states that "the particulars set out in the notice should be sufficiently explicit to

enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

12. This leads us to the fourth contention set out above. It has been pointed out that before finalising the assessment list an opportunity must be given to the assessees to object to the enhanced valuation. The petitioner's complaint is that in all the special notices issued before finalising the assessment list, how the annual value has been ascertained has not been stated and that therefore, the assessees are handicapped in putting forward their objections to the basis and the mode of fixing the annual value. I am inclined to agree with the contention of the petitioner that the mere mention of the annual value, as determined by the assessor in the special notice, is not sufficient and that the details as to how that valuation was arrived at are necessary to put the assessee on notice of the basis and the mode of fixing the annual value so as to enable him to file his objections to the proposed increase. Section 100 of the Madras City Municipal Corporation Act, 1919, enables the property tax being levied on the gross annual rent at which they may reasonably be expected to let at the time of assessment less a deduction, in the case of buildings of ten per cent. of such annual rent which is attributable to the buildings alone, in lieu of all allowance for repairs etc. Schedule IV of the Act sets out the Rules governing the levy and assessment of property tax. Rule 1-C directs the Commissioner to enter the annual value of all lands and buildings and the tax payable thereon in the assessment books. Rule 1-D enables a general revision of the assessment books by the Commissioner once in every five years. Rule 1-E says that an assessment once made shall continue in force until it is revised and until the revised assessment takes effect. Rule 2 says that when assessment books have been prepared for the first time and whenever a general revision of such books has been completed the Commissioner shall give public notice specifying the time when and the place where the books may be inspected and stating that revision petitions will be considered if they are preferred within fifteen days from the date of such notice. The proviso to rule 2 specifically says that in every case where there is an enhancement in the assessment the Commissioner shall also cause intimation thereof to be given by a special notice to be served on the owner or occupier of the property concerned. Rule 3 says that the Commissioner may after giving notice to the parties concerned and after hearing their objections, if any, amend the property tax assessment books at any time between one general revision and another by altering the valuation of any property or the amount of tax. The proviso to rule 2 clearly indicates that wherever there is an enhancement in the assessment, a special notice is to be served on the owner or occupier of the property concerned. The special notice contemplated by the proviso is intended to give an opportunity to the owner or occupier of the property to put forward his objections to the enhancement in the assessment. The owner or occupier can put forward his objections only if he knows why there has been enhancement in the assessment. Therefore, the special notice should necessarily contain the basis for enhancement of the assessment so that the assessee may be able to object to the enhancement of the assessment. Thus there is considerable force in the contention of the petitioner that the special notices issued by the second respondent should contain the reasons for the enhancement of the assessment and unless the reasons are given the assessees may not be able to put forward any effective objections to the said enhancement.

13. The petitioner has produced a bundle of photostat copies of the special notices served on some of the assessees in some of the Corporation Divisions. In all these special notices, the old annual value after the revision have alone been mentioned and the reason for enhancement has not been given. The assessee on receipt of such special notice cannot be expected to know as to why the enhancement may be due to: (1) rental

difference noticed during the course of the inspection of the property by the assessing officers, (2) due to additions or alterations in the existing building, and (3) construction of a new building. Unless the assessee is told as to what is the reason for the enhancement in the assessment, he may not know on what ground the enhancement has been made. In such cases, he may not be able to put forward his objections specifically and effectively. It is, therefore, clear that the special notices should give reasons for enhancement.

14. Coming to the third contention that the annual value of the buildings has to be determined only with reference to the fair rent formula provided for in the Madras Buildings (Lease and Rent Control) Act, the petitioner has referred to a series of decisions of the Supreme Court which seems to lay down that the fair rent formula provided for in the Rent Control Act should normally be followed in the determination of the annual value of buildings. In *Corporation of Calcutta* v. *Smt. Padma Debi*[1], it was held that the annual rent could not be fixed higher than the standard rent fixed under the relevant Rent Control Act. In *Guntur Municipal Council* v. *Rate-payers' Association*[2], the Supreme Court again pointed out that for determining the annual value of the buildings under section 82 (2) of the Madras District Municipalities Act, the test essentially to be applied is what rent the premises can lawfully fetch if let out to a hypothetical tenant and that the Municipality is bound by the fair rent which would be payable for a particular premises under the Rent Control Act in force during the year of assessment and is not free to assess the tax on any arbitrary annual value. It was also pointed out in that case that there can be no distinction between buildings for which fair rent has been fixed by the Rent Controller and those in respect of which no such fair rent has been fixed and that when the Rent Controller has not fixed the fair rent, the municipal authorities will have to arrive on their own figure of fair rent in accordance with the principles laid down in the Rent Control Act. Dealing with the plea of inconvenience and procedural difficulties in the application of the principles laid down in the Rent Control Act for fixing fair rent for buildings by the assessing authorities constituted under the District Municipalities Act, the Court said:

> "We are not concerned with the procedural difficulties which may be experienced; we have to declare what the law is and as appears to be well settled the assessment of valuation for the purpose of tax must be made in accordance with and in the light of the provisions of the Rent Control Act which would be in force during the period of assessment."

In *Delhi Municipality* v. *M. N. Soi*[1], the Supreme Court again pointed out that the municipal authorities are obliged not to assess at a higher rental value than the standard rent fixed under the Rent Control legislation. In that case, the landlord was receiving a sum of Rs. 1,500 per month as rent in respect of a building and that the said actual rent received was taken as the basis for fixing the annual value of the building ignoring the fair rent of Rs. 170 per month fixed for that building under the Delhi Rent Control Act in 1941. The Court pointed out that the municipal authorities cannot take advantage of the defiance of the law relating to Rent Control Act and treat the rent received by him in defiance of the law as a reasonable rent and that, therefore, the assessing authorities are obliged not to assess at the actual rent received but on the standard rent fixed under the Rent Control Act. In a recent decision in *S. Ramaswamy* v. *The Commissioner, Corporation of Madras*[2], this Court after considering the above decisions of the Supreme Court, had observed:

> "Thus the Supreme Court has taken consistently the view that the standard of reasonableness has to be judged not

1. (1962) 3 S.C.R. 49: A.I.R. 1962 S.C. 151
2. (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J 142: (1971) 2 An. W.R. (S.C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353.

1. (1976) R.C.J. 763: 1976 4 S.C.C. 535: A.I.R. 1977 S.C. 302.
2. C.R.P. Nos. 3275 and 3276 of 1975.

from the expectation of a landlord who takes the risk of prosecution and punishment which the violation of the law involves, but the expectation of the landlord who is prudent enough to abide by the law, and that, therefore, even in cases where the rents actually collected by the landlords are higher than the standard rent the assessment could not be made on the basis of the actual rents received by the landlord but by the fair rent which alone the landlord is entitled to collect legally from the tenants".

15. In *Indore Municipality* v. *Ratnaprabha*[1], it was, however, held that where the building has never been let out and is being used in a manner where the question of fixing its standard rent does not arise, it would be permissible to the municipal authorities to fix its reasonable rent without regard to the provisions of the Rent Control Act. But that decision is based on the *non-obstante* clause contained in clause (*b*) of section 138 of the M. P. Municipal Corporation Act, 1956. Since section 100 of the Madras City Municipal Corporation Act does not contain such a *non-obstante* clause, the earlier decisions of the Supreme Court referred to above will have to apply. However, in cases where the buildings are not governed by the provisions of the Rent Control Act, there is no question of infringement of the provisions of the Rent Control Act by the owners receiving whatever rent is paid by the tenants and, therefore, the actual rent collected by the assessees can be taken as the reasonable rent which the building is likely to fetch. Under the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960, certain buildings fetching rent above a particular limit are not governed by the provisions of the Act and in those cases there cannot be any restriction as to the rents that can be received in respect of the buildings. Similarly there are certain buildings which have been exempted from the provisions of the said Act. Therefore, the fair rent formula contemplated by the Rent Control Act need not strictly be followed by the assessing authorities in respect of such of those buildings which do not come under or are exempted from the purview of the Rent Control Act.

16. In this case the petitioner, has prayed for a *mandamus* restraining the respondents from levying or revising or collecting the property tax on the land and buildings belonging to the petitioner at No. 83, Big Street, Madras-5 adopting the plinth area basis. It has already been pointed out that the consistent view taken by the Supreme Court is that plinth area basis cannot be adopted for rating purposes. The respondents, in their counter-affidavit, have also categorically stated that the plinth area basis is not being or going to be adopted for assessment of property tax. The learned Advocate-General has also represented to the Court that the second respondent is not going to adopt the plinth area basis for the purpose of assessing the property tax. The petitioner has also not given any specific instance where the plinth area basis has been adopted. In these circumstances it is not possible to issue a writ of *mandamus* as prayed for by the petitioner. However, there will be a direction to the second respondent to set out the reasons for enhancement of property tax wherever there is an enhancement so that the assessees may know the basis adopted in determining the annual value and put forward their effective objections to the proposed enhancement. In determining the annual value, the second respondent will also follow the fair rent formula provided for in the Rent Control Act in respect of buildings which are governed by the provisions of the Rent Control Act. Accordingly, there will be a limited direction in this writ petition as set out above. The writ petition is ordered accordingly. The petitioner will be entitled to the costs of the petitioner which I fix at Rs. 150 from the second respondent.

R.-S. —— *Ordered accordingly.*

1. (1976) 4 S.C.C. 622: (1977) R.C.J. 443 : A.I.R. 1977 S.C. 308

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

M. M. Jaffer Kermani .. *Appellant**

v.

M. M. Hassan Kirmani and another .. *Respondents.*

(A) *Wakf Act (XXIX of* 1954), *sections* 15 (1) *and* 45—*Suit by one mutawalli against another for accounts — Notice of suit not given—No allegation of mismanagement or negligence—Suit whether maintainable.*

(B) *Civil Procedure Code (V of* 1908), *section* 92 (1).

In a suit for accounts, the cause of action arises *de die in diem*. A notice prior to an action for accounts might help the plaintiff to subserve the benefits of his action. But the absence of such a suit notice cannot be criteria to hold that such a suit is not maintainable in law or in fact. No doubt the issue of such a suit notice prior to the filing of a suit for accounts would act a step-in-aid to the furtherance of the cause of the plaintiff. Absence of such notice cannot be viewed as a fatality so as to non-suit him on that ground alone. [*Para.* 5.]

The powers of general superintendence referred to in section 15 (1) of the Wakf Act ought not to be so liberally construed so as to vest in the Wakfs Board an authority analogous to the power vested in a competent judicial authority to compel a trustee to render an account to a co-trustee as regards the income from the trust properties. The Board has undoubtedly the power not only in exercise of their visitorial jurisdiction contemplated under section 15 (1) of the Act, but also in exercise of such powers on invitation of third party to enquire into the alleged mis-management of the wakf by a particular mutawalli-trustee. Such an enquiry is possible only on reasonable information obtained by them regarding the alleged mis-management or on a complaint made in writing supported by an affidavit by a person interested in the wakf alleging such acts of omissions and commissions on the part of a mutawalli. [*Para.* 8.]

It is by now well-established that if a suit did not fall within the ambit of section 92 (1) of the Code of Civil Procedure it is not hit by the provisions of sub-section (2) thereof. In a case where the subject-matter is governed by the Wakf Act, and in the absence of an embargo on the filing of such a suit in ordinary civil Courts for rendition of accounts by one trustee to another under the provisions of the Act, it is easy to conceive that such a suit for accounts is maintainable by one trustee against the other and there is no bar to it. [*Para.* 9.]

Cases referred to:—

Appanna Paricha v. *Narasinga Paricha*, (1921) 41 M.L.J. 608: 15 L.W. 18: I.L.R. 45 Mad. 113: A.I.R. 1922 Mad. 17; *Thirugnanasambandham Pillai* v. *Ramachandra Pillai,* (1953) 1 M.L.J. 486: A.I.R. 1953 Mad. 744; *Thirumalai-Tirupati Devasthnams Committee* v. *Krishnayya,* (1942) 2 M.L.J. 785: I.L.R. (1943) Mad. 819: A.I.R. 1943 Mad. 146; *V. L. N. S. Temple* v. *I. Pattabhirami,* (1967) 1 S.C.R. 280: A.I.R. 1967 S.C. 781.

Appeal under clause 15 of the Letters Patent against the decree of the Honourable Mr. Justice Sethuraman, dated 9th January, 1976 and passed in Second Appeal No. 2478 of 1974 preferred against the decree of the City Civil Court (III Additional Judge) Madras in A.S. No. 10 of 1973. (O.S. No. 1606 of 1968, City Civil Court) III Assistant Judge, Madras.)

V. Ratnam, for Appellant.

K. Chandramouli, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The first defendant in O.S. No. 1606 of 1968 on the

* L.P.A. No. 35 of 1976. 17*th June,* 1977.

file of the City Civil Court, Madras, is the appellant. Haji Mirza Ali Naki Sahib Kirmani, executed a wakf deed whereunder he set apart his property bearing door No. 73, Sembudoss Street, for certain religious and charitable purposes. After earmarking a portion of the income from the said property for certain purposes accepted in Muslim Law, he directed that the surplus income be taken over by the mutawalli. The first mutawalli was the wakif himself, and thereafter he constituted his wife and sons as joint mutawallis. He had two sons and the plaintiff is the son through one such son and defendants 1 and 2 are sons of the second son of the wakif. The wakif died in 1927 and after the death of his wife and his two sons, it transpires that the plaintiff was in possession of the suit property for a considerable length of time. The first defendant initiated proceedings before the Wakf Board and sought for a direction regarding accounting of the income from the wakf property from the plaintiff. The Wakf Board however in the interest of amity directed that the plaintiff and both the defendants should act as joint mutawallis under the supervision of one Amin Khalili. The plaintiff questioned this order of the Board in a Writ Petition No. 404 of 1961 on the file of this Court. The writ petition was dismissed. The plaintiff filed Writ Appeal No. 3 of 1963. A compromise was entered into in the said writ appeal and the memorandum of compromise is as follows:—

"*Memorandum of compromise*".

The parties hereby agree to and compromise as follows:—

1. M. M. Hassan Kermani (Appellant), M. M. Jaffer Kermani (2nd respondent) and M. M. Sadique Kermani, shall be the joint Mutawallis of the Haji Mirza Ali Nacki Kermani Wakf and M. M. Jaffer Kermani shall be the managing mutawalli of the said wakf.

2. M. M. Jaffer Kermani, shall be in charge of the rental collections from the several tenants in occupation of the wakf property and shall be accountable to the wakf for the said collections.

3. The receipts for the rents collected shall be issued by M. M. Jaffer Kermani (managing mutawalli) in the name of the wakf.

4. The tenants shall pay the rents only on the production of the receipts signed by the aforesaid, M. M. Jaffer Kermani (managing mutawalli)

5. The rental collections so made shall be deposited in a scheduled bank in the name of the wakf and the bank account shall be operated by M. M. Jaffer Kermani (managing muthavalli in charge).

6. The muthavallis shall perform the Majlises every year during Muharram as enjoined under the wakf deed dated 17th September, 1919 for a sum not exceeding Rs. 600 (Rupees six hundred only).

7. The muthavalli in charge of rental collections shall pay the Corporation taxes and other public charges for the wakf property and expend a sum not exceeding Rs. 200 towards incidental charges *viz.*, postage and rental collection charges and Rs. 300 towards repairs.

8. The balance, after meeting the above expenses shall be divided among the mutawallis or their respective heirs after them, at the end of every year in the following manner:—

(*a*) M. M. Jaffer Kermani }
(*b*) M. M. Sadique Kermani } 60%

(*c*) M. M. Hassan Kermani 40%

9. A sum of Rs. 40 (Rupees Forty) only shall be paid every month to Sri M. M. Hassan Kermani and a sum of Rs. 60 (Rupees Sixty only) to Jaffer Kermani and Sadique Kermani on or before the 15th of every succeeding month, and which sum shall be given credit to at the time of taking of accounts as mentioned in para. 8 above.

10. If there is change in the mutawalliship the balance after meeting the expenses shall be distributed according to the terms of the wakf deed dated 17th September, 1919.

11. The accounts shall be audited every year by competent auditor. The account books shall be kept open for inspection to the mutawallis.

12. In the event of any portion falling vacant it shall be let out with the consent of all the mutawallis preference must be given to the mutawalli, not in occupation of any portion of the wakf property.

13. The room in the second floor shall be used for keeping the panjas.

14. The mutawallis are at liberty to put up additional pucca constructions in the open terrace.

15. The rental advance received by M. M. Hassan Kermani, from the tenants at the time of the commencement of the tenancy shall, when refunded to the tenants at the termination of tenancy and on the production the receipts issued by M. M. Hassan Kermani; be debited to the account of M. M. Hassan Kermani.

16. The accounting between the parties shall commence only from 1st October, 1964. There shall be no accounting by M. M. Hassan Kermani in respect of the past transactions, during his period of mutawalliship and no claim shall be made against him in respect thereof.

17. All public charges due on the property upto 30th September, 1964 shall be paid only by M. M. Hassan Kermani and if any payment is made by the wakf in respect of the same, the same shall be debited to the respective shares of M. M. Hassan Kermani.

18. M. M. Hassan Kermani shall continue to occupy the following portions (already in his occupation) in the wakf property *viz.*, one hall an adjoining room, the adjoining kitchen situate on the north-eastern portion and a room on the southernside above the garage, besides the bath room and lavatory in the ground floor.

19. A sum of Rs. 50 (Rupees fifty per month) shall be debited to the account of M. M. Hassan Kermani towards the rent payable for the aforesaid portion in his occupation at the time of taking of accounts as stated in para. 8.

20. In case of disputes between the mutawallis the same shall be referred to the Wakf Board or to Khan Bahadur Ameen Khaleeli if the parties so desire.

21. This compromise shall come into force with effect from 1st October, 1964.

Dated Madras this the 20th July, 1964.

Sd. M. M. Jaffer Kermani, Respondent.

Sd. S. M. Amjad Nainar, Counsel for Respondent.

Sd. M. Md. Hassan Kermani, Appellant.

Sd. K. Chandra Mouli, Counsel, for Appellant.

Sd. M. M. Sadique Kermani, Joint mutavalli.

2. The memorandum of compromise to which both the plaintiff and defendants 1 and 2 were parties, was implemented and acted upon by the parties until the plaintiff came to Court in 1968. Under the compromise, the plaintiff and the defendants were constituted as joint mutawallis and the first defendant was put in charge of rental collections of the wakf property and he was put in general management of the same. A sum of Rs. 600 was set apart for the purpose of the object of the wakf and the net rental income was to be divided between the parties at the end of each year, the deponent being entitled to a 40% and the defendants together to the balance of 60%. The plaintiff was allowed to continue in possession of a portion of the wakf property and he was to be charged a monthly rent of Rs. 50 for such occupation. As is seen from the memorandum of compromise, the accounts were to be audited every year and the

plaintiff was to be paid a sum of Rs. 40 a month and the defendants Rs. 60 a month. The plaintiff's complaint was that he was not paid the monthly sums as contemplated in the memo. According to the plaintiff, the first defendant did not even perform the ceremonies which he was obliged to perform as per the objects of the wakf and failed to render proper accounts for the collections made by him from the trust property. He alleges that he was not allowed to inspect the accounts and that there was no audit of the same, though the compromise memo. provided for such annual audit. He, therefore, filed the present action for a direction to the first defendant to render an account of the income and expenses of the wakf and also for direction against the first defendant to pay the amount due to the plaintiff on ascertainment. The first defendant's case was that he was compelled to enter into the compromise in the writ appellate Court and the compromise itself is not legal or valid and that it is not open to parties to go behind the terms of the wakf deed. He maintains that he was rendering a true and proper account to the State Wakf Board as required under section 36 of the Wakf Act. He refers to various types of litigations indulged in between him and the plaintiff from time to time and would emphatically contend that he never suppressed any accounts from the view of the plaintiff and that he was managing the wakf property diligently and denies that he is liable to render an account of the income from the wakf premises. He sought for a dismissal of the suit. The second defendant adopted the written statement of the first defendant. The trial Judge dismissed the suit. On further appeal by the plaintiff, the appellate Court also dismissed the suit but for different reasons. Thereafter the plaintiff carried the suit in second appeal to the High Court and Sethuraman, J., heard the second appeal, allowed the same and passed a decree for accounting as against the first defendant in the terms asked for. It is as against this the first defendant has come up in appeal.

3. Mr. Ratnam appearing for the appellant contends that the learned single Judge, who decided the second appeal, was wrong in having directed an account, since there was not even a notice before suit for inspection of the accounts. He relies upon the observation of the first appellate Court to the effect that it is not the case of the plaintiff that the first defendant did not make the account books available for inspection at the premises of the wakf. His second contention was that an accounting is not necessary, as the plaintiff was only interested in the payment of the amount due to him from the trust as per the compromise memo. and a general accounting appears to be unnecessary. Thirdly, his contention was that it was usual for one trustee to seek for accounts from another trustee as they are by necessary implication or presumed to be in general management of the wakf property, though for administrative purposes, the first defendant is in charge of the same. He also claims that accounts were being audited and sent to the plaintiff and the plaintiff cannot, therefore, have any complaint. Contending *contra*, learned counsel for the respondent would say that the litigation and the misunderstandings between the parties as disclosed from their conduct ever since 1961 by itself is a pointer to the fact that the first defendant would not care for the interests of the plaintiff or to the proper management of the trust and, therefore, he is not only accountable but should render an account as called for. Even to grant the second relief asked for in the plaint, namely, a quantification of the amount payable by the first defendant to the plaintiff in accordance with the memo. of compromise a general accounting is necessary and, therefore, the judgment of the learned Judge directing such an account is correct and cannot be interfered with. Regarding the third objection, it is contended that even if no negligence is alleged as against a managing trustee, the innocuous prayer for rendering an account of the trust properties in the management of the managing trustee is necessary not only in the general interest of the wakf concerned, but also for

the adjustment of equities between the parties. The vague objection raised by the learned counsel for the appellant that under the Wakf Act, the Wakf Board is expected to generally supervise all wakf and this provision by itself is sufficient to non-suit the plaintiff is answered by the fact that in particular circumstances a specific suit for account as between the co-trustees is possible and ought not to be rejected *in limine,* if the circumstances warrant such an accounting.

4. As regards the first contention that there was no warning to the first defendant to render an account before the plaintiff came to Court, Mr. Ratnam is not quite right when he wanted to rely upon the observations of the appellate Judge, who said that it was not the plaintiff's case that the first defendant did not make the account books available for inspection. This is clear from the fact that the plaintiff in paragraph 11 of the plaint after referring to the obligation of the first defendant to get the accounts audited every year, alleged:

> "The 1st defendant who is in charge of the wakf income has not allowed the plaintiff to inspect the accounts or have them audited after giving notice to the other trustees".

5. In the written statement of the first defendant there was of course a denial, but the matter was not pursued further to enable the Court to infer that the plaintiff was kept mostly in the dark about the accounts of the wakf. In a suit for accounts, the cause of action arises *de die in diem.* A suit notice prior to an action for accounts might help the plaintiff to subserve the benefits of his action. But the absence of such a suit notice cannot be the criteria to hold that such a suit is not maintainable in law or in fact. No doubt, the issuance of a suit notice prior to the filing of a suit for accounts would act as a step-in aid to the furtherance of the cause of the plaintiff. But that cannot be viewed as a fatality so as to non-suit him on that ground alone.

6. Coming to the next contention, we are unable to agree with Mr. Ratnam that the grant of the second prayer sought for in the plaint does not necessarily involve a direction to the first defendant for accounting. In order to quantify the amount due to the plaintiff which process involves an ascertainment of such quantum, an accounting is necessary. Such an accounting can only be by directing the first defendant to account for the income and expenses relating to the wakf property. The second prayer is very much inter-linked with the first direction sought for against the first defendant to render an account. In this sense both the reliefs are inseparable. Ascertainment of the amount due to the plaintiff is possible only after scrutiny of the accounts and ascertaining the net income available for division as between the plaintiff and the defendants. In order to reckon the amount due to the plaintiff, accounting by the first defendant is obviously necessary.

7. The learned Judge after finding that the compromise is binding on both the plaintiff and defendants and after having held that the suit was maintainable went into the question whether a suit for accounts as filed by a co-trustee is possible. Regarding the findings of the learned Judge on the first two points, posed by him, it has not been canvassed before us. Even otherwise, we are of the view that in a Letters Patent Appeal such a concurrent finding cannot be a subject-matter of issue.

8. The last question, therefore, that looms large in this case is that in the absence of any allegation as to mismanagement or negligence on the part of a co-trustee whether a bare suit for accounting by one trustee against another is maintainable. Mr. Ratnam's contention is that such a suit having regard to the provisions of the Wakf Act ought not to be entertained. Section 15 of the Wakf Act, 1954, hereinafter referred to as the Act, refers to the functions of the Board. Sub-section (2) of section 15 generally refers to such functions without prejudice to the power of general superintendence of all wakfs in the State which vested in the Board by reason of section 15 (1) of the Act. Sub-clause (*b*) of sub-section (2) of section 15 says that the functions of the Board *inter alia* shall be to

ensure that the income and other property of wakfs are applied to the objects and for the purposes for which such wakfs were created or intended. Section 44 enables a person interested in a wakf to make an application to the Board complaining about mismanagement and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such action thereon as it thinks fit. Section 45 of the Act prescribes the methodolgy by which such an enquiry can be undertaken by the Board. On the strength of these provisions Mr. Ratnam contends that it is open to the plaintiff to approach the Wakf Board for relief. It should not be however forgotten that the power of general superintendence vested in section 15 or even the specific power to safeguard the income of wakf property which is also vested in the Wakf Board would not enable the Board to direct a mutawalli to render an account to a co-mutawalli. The powers of general superintendence referred to in section 15 (1) ought not to be so liberally construed so as to vest in the Board an authority analogous to the power vested in a competent judicial authority to compel one trustee to render an account to a co-trustee as regards the income from the trust properties. The Board has undoubtedly the power not only in exercise of their visitorial jurisdiction contemplated under section 15 (1) of the Act, but also in exercise of their *suo motu* powers under section 45 or in exercise of such powers on invitation of a third party to enquire into the alleged mismanagement of wakf by a particular mutawalli or trustee. Such an enquiry is possible only on reasonable information obtained by them regarding the alleged mismanagement or on a complaint made in writing supported by an affidavit by a person interested in the wakf alleging such acts of omissions and commissions on the part of a mutawalli. We are unable to agree with the learned counsel for the appellant that the powers envisaged in section 15 (1) and 15 (2) (*b*) of the Act would enable the Board to grant the relief to the plaintiff asked for in these civil proceedings.

9. As regards the right of the plaintiff to call for account, clause 16 of the memorandum of compromise which is binding on the parties refers to such accounting between the parties and makes it clear that such accounting shall commence from 1st October, 1964. This clause, therefore, expressly provides for *inter se* accounting. Even otherwise, it is by now well established that if a suit did not fall within the ambit of section 92 (1) of the Code of Civil Procedure it was not hit by the provisions of sub-section (2) thereof. In a case where the subject-matter is governed by the Wakf Act, and in the absence of any embargo on the filing of a suit in ordinary civil Courts for rendition of accounts by one trustee to another under the provisions of that Act, it is easy to conceive that such a suit for accounts is maintainable by one trustee as against the other and there is no bar to it.

10. We are here concerned with a wakf which does not involve the vindication of the rights of the public in a public charitable trust. The objectives of the wakf are limited and have no wide public application. In such circumstances, a suit by one trustee against a co-trustee praying *inter alia* for an account of the trust properties in their hands is maintainable, even though the suit is not instituted under section 92 of the Code of Civil Procedure. This is the dicta of the Full Bench of our Court in *Appanna Poricha* v. *Narasinga Poricha*[1].

11. In *Thirugnanasambandham Pillai* v. *Ramachandram Pillai*[2]. Subba Rao, J., as he then was, categorically laid down that a suit by one Managing Trustee for rendition of accounts against the other trustees during the period of his turn would be maintainable without the sanction of the Advocate-General. He referred to an earlier decision of the Court in *Tirumalai Tirupati Devasthanams Committee* v. *Krishnayya*.[3]

1. (1921) 41 M.L.J. 608: 15 L.W. 18: I.L.R. 45 Mad. 113: A.I.R. 1922 Mad. 17.
2. (1953) 1 M.L.J. 496: A.I.R. (1953) Mad. 744.
3. (1942) 2 M.L.J. 785: I.L.R. 1943 Mad. 819: A.I.R. 1943 Mad. 146.

12. In *V. L. N. S. Temple* v. *I. Pattabhirami*[1], the Supreme Court made it clear to which also Subba Rao, CJ., was a party that no trustee can get discharge unless he renders an account of his management and this liability is irrespective of any question of negligence or wilful default. That was a case in which an account was sought for from the ex-trustees by the present trustees. Even though the Supreme Court said in that case that the present trustee can demand rendition of accounts from the ex-trustee in respect of their management without alleging against them any acts of negligence or default, for a greater reason, we are of the view that a co-trustee, who in terms of a compromise decree has obliged himself to render an account to the other trustee, should not only in terms of the memorandum of compromise but also in law is obliged to render an account to the trustee, who demands for it. This is so because failure to render an account which would be a due process for the quantification of the amount due to the "demanding trustee" is likely to prejudice him and affect his rights. Not only for the reason that there is no prescription under section 92 of the Code of Civil Procedure for the institution of such actions, but also for the reason that failure to give a direction to a co-trustee in management to render an account will affect vested rights and cause prejudice to the person seeking for such an account and thirdly, as in the instant case, the first defendant has obligated himself under the compromise decree to so account, the appellant cannot seek for interference with the judgment of Sethuraman, J.

13. The learned Judge has also found on merits that since 1967-68, the accounts have not been either audited or submitted to the Wakf Board.

14. For all the reasons stated above, this Letters Patent Appeal is dismissed, but there will be no order as to costs.

R.S. *Appeal dismissed.*

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1. (1967) 1 S.C.R. 280: A.I.R. 1967 S.C. 781.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A.D. Koshal, J.*

S. Gatikachala Mudaliar and others .. *Petitioners**

v.

The State of Tamil Nadu, by its Special Secretary Prohibition and Excise Department, Madras, 9 and another .. *Respondents.*

(A) *Tamil Nadu Prohibition Act* (*X of* 1937), *section* 22—*Tamil Nadu Denatured Spirit, Methyl Alcohol and Varnish* (*French Polish*) *Rules* (1959), *rule* 9 (vii)—*Petitioners carrying on business of manufacturing and selling varnish within the territorial limits of Tamil Nadu--Notification by Government--Petitioner called upon to deposit security as per Rules—Power to demand security, conferred on Collectors only—Rules* ultra vires *section* 22 *of the Act.*

(B) *Constitution of India* (1950), *Article* 359 (1)—*Proclamation of Emergency—Challenge to infraction of positive statutory provision not the same as attempt to enforce fundamental right—Recourse to writ remedy not affected by continuance of Proclamation and Presidential Order.*

Section 22 of the Tamil Nadu Prohibition Act having laid down the manner in which security must be demanded and furnished, the submitting authority cannot frame any rule which prescribes a different manner in that behalf. The question of demanding security in a particular case and of its amount is left by section 22 entirely to the Collector so that no rule can prescribe that security shall be furnished in all cases that it shall be furnished at a particular rate based on the quality of the commodity covered by the licence in each case, and that the Collector would have nothing to do with these matters. Clause (*vii*) of rule 9 of the Rules therefore is *ultra vires*

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* W.P. Nos. 3437, 5667, 5732, 7181 and 6963 of 1975 and 793 and 795 of 1976.

4th January, 1977.

section 22 of the Act and any action taken in pursuance of it must be held to be illegal. [*Para.* 4.]

When a person seeks to challenge an infraction of a positive statutory provision he is not asking for the enforcement of a fundamental right even though the content of the two may be the same. In the instant case what the petitioners prayed for was that the action of the State in demanding security under a rule which runs counter to section 22 of the Tamil Nadu Prohibition Act be struck down on the ground of patent illegality which cannot be equated with an attempt to enforce a fundamental right even though the fields in which section 22 of the Act and the fundamental right of trade operate are over-lapping. [*Para.* 3.]

Held, that the continuance of the Proclamation and of the Presidential Order therefore did not stand in the way of the entertainment of the writ petitions.

Cases referred to:—

A.D.M., Jabalpur v. *S. Shukla*, (1976) 2 S.C.C. 521: (1976) Crl.L.J. 945: A.I.R. 1976 S.C. 1207; *State of M.P.* v. *Thakur Bharat Singh*, (1967) 2 S.C.R. 454: (1968) 1 S.C.J. 173: (1968) M.L.J. (Crl.) 24: A.I.R. 1967 S.C. 1170.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed there with the High Court will be pleased to issue writs of (1) *certiorari* calling for the records and to quash the Tamil Nadu Government Notification No. 11 (2) P.E. 998 (d) 75 dated 31st March, 1975, G.O. No. 105, Prohibition and Excise, dated 31st March, 1975, and published in Tamil Nadu Government Gazette (Extraordinary) dated 31st March, 1975, appointing under clause (*b*) of sub-rule (*vii*) of rule 9 of the Madras Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959 the 1st day of April, 1975 as the date on which the provisions of clause (*a*) of sub-rule (*vii*) of rule 9 of the said Rules shall come into force as far as the petitioner is concerned (W.P. No, 3437 of 1975); (2) *mandamus* forbearing the respondents from enforcing the provisions of clause (*a*) of sub-rule (*vii*) of rule 9 of the Tamil Nadu Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, so far as this petitioner in each of the petitions is concerned (W.P. No. 5667 of 1975, W.P. No. 5732 of 1975, W.P. No. 6963 of 1975, W.P. No. 793 of 1976 and W.P. No. 795 of 1976; (3) *certiorari* calling for the records relating to rule 9 (2) (*vii*) (a) of the Tamil Nadu Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959, as amended by G.O. Ms. No. 214, Home, dated 3rd February, 1970 from the 1st respondent and quash the rule 9 (2) (*vii*) (a) so far as the petitioner is concerned (W.P. No. 7181 of 1975.

S. Narayana Iyengar and *V. Ganapathi Subramania Iyer*, for Petitioner.

C. Chinnaswami, for Government Pleader, for Respondents.

The Court made the following

ORDER.—By this judgment I shall dispose of seven petitions under Article 226 of the Constitution of India, *viz.*, Writ Petitions Nos. 3437, 5667, 5732, 7181 and 6963 of 1975 and Writ Petitions Nos. 793 and 795 of 1976, in each of which the petitioner is either firm or an individual carrying on the business of manufacturing and selling varnish within the territorial limits of Tamil Nadu under licences issued in pursuance of the provisions of the Tamil Nadu Denatured Spirit, Methyl Alcohol and Varnish (French Polish) Rules, 1959 (hereinafter referred to as the Rules) which were framed by the Governor of Tamil Nadu in exercise of the powers conferred on him by, *inter alia*, the provisions of section 54 of the Tamil Nadu Prohibition Act, 1937 (hereinafter referred to as the Act). In the year 1970, sub-rule (*vii*) of rule 9 of the Rules was amended so as to consist of two clauses which read thus:

"(*vii*) (a) *Security*.—In the case of applications for a licence in Forms D.L. 1, D.L. 2, D.L. 4, D.L. 5, D.L. 6 or D.L. 8, the licensing authority before granting the licence, shall require the applicant to deposit with the Collector

in cash or in Government Promissory Note, as security for the due observance of the conditions of the licence, a sum calculated at the rate of twenty-five paise per bulk litre of the annual quota proposed to be allowed under the licence for denatured spirit and/or methylated spirit and/or methyl alcohol, in respect of licences in Forms D.L.1, D.L.2, D.L.4 and D.L.5 and at the rate of fifty paise per litre of the annual quota of varnish proposed to be allowed under the licence in respect of licences in Forms D.L.6 and D.L.8. In the case of an application for a licence in Form D.L.1, from a distillery, however, the security deposit to be required shall be calculated at the rate of five paise per bulk litre of the annual quota of denatured spirit and methylated spirit and methyl alcohol. In the case of non-observance of the terms of the licence, security deposit may be forfeited to Government and the licence cancelled, provided that no forfeiture of deposit shall be made unless the licensee has had a reasonable opportunity of showing cause against such a forfeiture.

(*b*) The provisions of clause (*a*) above shall take effect on or from the 1st April, 1970. In the case of licences already granted as on that date, the security deposit prescribed shall alone be required to be made before the licence is renewed."

No action was taken under clause (*a*) till the 31st of March, 1975, when the State Government issued a notification saying that its provisions would be enforced with effect from 1st of April, 1975, and thereafter the petitioners were served with notices calling upon them to deposit security in conformity therewith. The petitioners feel aggrieved by the action of the Government in issuing the notification and demanding security from them and they have therefore invoked the writ jurisdiction of this Court with various prayers to the effect that such action be quashed and the Government directed not to enforce the provisions of clause (*a*) above extracted.

2. The case of the petitioners is based on the provisions of section 22 of the Act which is reproduced below:

"Every person taking out any licence or permit under section 6-A, 18, 19 or 20 may be required to execute a counter part agreement in conformity with the tenor of his licence or permit, and to give such security for the performance of his agreement as the Collector may require.".

It is contended that the power to demand security is specifically conferred on the Collector who has also been authorised to determine the amount thereof in each particular case and that the power having been so granted it was not open to the rule-making authority to provide that security shall be furnished by every licensee and that it shall be furnished according to the quantity of the denatured spirit, etc., covered by his licence, and thus to divest the Collector completely of that power. Before the merits or demerits of this stand can be judged, a preliminary objection raised by the learned Advocate-General has to be disposed of. That objection is to the effect that none of the petitions can be entertained by reason of the order of the President of India (hereinafter referred to as the Presidential Order) passed on the 8th of January, 1976, during the operation of a Proclamation of Emergency (hereinafter called the Proclamation) declaring, in pursuance of the provisions of clause (1) of Article 359 of the Constitution of India, that the right of any person to move any Court for the enforcement of the rights conferred by Article 19 thereof and all proceedings pending in any Court for the enforcement of such rights shall remain suspended for the period during which the Proclamation is in force. That clause states:

"Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in

force or for such shorter period as may be specified in the order."

This clause has been interpreted by their Lordships of the Supreme Court in *A.D M., Jabalpur* v. *S. Shukla*[1], to furnish a bar at the threshold to any petition seeking enforcement of a right conferred by Part III of the Constitution and mentioned in an order passed under the clause by the President. It follows that if any of the petitioners before me seeks to enforce a right under Article 19 of the Constitution it cannot be entertained. It was in this view of the matter that the stand taken on behalf of the petitioners at an earlier stage of the arguments to the effect that they were seeking the enforcement of the fundamental right of trade guaranteed to them under clause *(g)* of Article 19 of the Constitution of India was not seriously pressed and the submission thereafter made was that they were not seeking the enforcement of any fundamental right and that on the other hand what they demanded was the enforcement of a positive legal right flowing to them from specific legislation in the form of section 22 of the Act. That a distinction has to be made between a fundamental right and a legal right of the type above mentioned was recognised in unmistakable terms in *Shukla's case*[1], itself. In that case, certain persons had been detained under orders purporting to have been passed in pursuance of the provisions of the Maintenance of Internal Security Act. They challenged their detention on the ground that it had been ordered in violation of those provisions. The petitions filed by them were dismissed by Ray, CJ., Beg, Chandrachud and Bhagwati, JJ., (Khanna, J., dissenting) holding that what was sought to be enforced thereby was the fundamental right to personal liberty guaranteed by Article 21 of the Constitution which found mention in an order of the President dated the 27th of June, 975 promulgated under clause (1) of Article 359. During the course of agruments in that case reliance on behalf of the detenus was placed on *State of Madhya Pradesh* v. *Thakur Bharat Singh*[1], in which an order prohibiting a petitioner from residing in a specific area under section 3 (1) *(b)* of the Madhya Pradesh Public Security Act, 1959, which was found to be void because the provision infringed Article 19 of the Constitution was held to be challengeable during an Emergency despite the provisions of Article 358 of the Constitution on the ground that although the empowering provision could not have been challenged if it was contained in an enactment promulgated during the Emergency yet, as it was made by an Act passed at a time when Article 19 was operative, the invalidity of the provision could be demonstrated despite the existence of the Emergency. Dealing with that case, Beg, J., observed:

> "I do not think that there is any such case before us. It seems to me to be possible to distinguish the case on the ground that it was a case of patent voidness of the order passed so that the principle of legality, which is not suspended, could be affirmed even apart from enforcement of a specified fundamental right."

3. Bhagwati, J., dealt with this aspect of the matter at great length and his Lordship's observations on the point which are contained in paragraphs 552 to 555 of the report are reproduced below:

> "It will be clear from what is stated above that whilst a Presidential Order issued under Article 359, clause (1) is in operation, the rule of law is not obliterated and it continues to operate in all its vigour. The executive is bound to observe and obey the law and it cannot ignore or disregard it. If the executive commits a breach of the law, its action would be unlawful, but merely the remedy would be temporarily barred where it involves enforcement of any of the fundamental rights specified in the Presidential Order. This would be obvious if we consider what would be the position under the criminal law. If the executive detains a person contary to law or shoots him

1. (1976) 2 S.C.C. 521: (1976) Cri.L.J. 945: A.I.R. 1976 S.C. 1207.

1. (1968) 1 S.C.J. 173: (1968) M.L.J. (Crl.) 24; (1967) 2 S.C.R. 454: A.I.R. 1967 S.C. 1170.

deed without justifying circumstances, it would clearly be an offence of wrongful confinement in one case and murder in the other, punishable under the relevant provisions of the Indian Penal Code, unless the case falls within the protective mantle of section 76 or 79 and the officer who is responsible for the offence would be liable to be prosecuted, if there is no procedural bar built by the Code of Criminal Procedure against the initiation of such prosecution. The Presidential Order suspending the enforcement of Article 21 would not bar such a prosecution and the remedy under the Indian Penal Code would be very much available. The offence of wrongful confinement or murder is an offence against the society and any one can set the criminal law in motion for punishment of the offender. When a person takes proceeding under the Code of Criminal Procedure in connection with the offence of wrongful confinement or murder or launches a prosecution for such offence, he cannot be said to be enforcing the fundamental right of the *detenue* or the murdered men under Article 21 so as to attract the inhibition of the Presidential Order.

So also, if a positive legal right is conferred on a person by legislation and he seeks to enforce it in a Court, it would not be within the inhibition of a Presidential Order issued under Article 359, clause (1): Take for example the class of cases of detention where no declaration has been made under sub-sections (2) and (3) of section 16-A. This category would cover cases where orders of detention have been passed prior to 25th June, 1975, because in such cases no declaration under sub-section (2) or (3) of section 16-A is contemplated and it would also cover the rather exceptional cases where orders of detention have been made after 25th June, 1975 without a declaration under sub-section (2) or sub-section (3) of section 16-A. Sections 8 to 12 would continue to apply in such cases and consequently the detaining authority would be under an obligation to refer the case of the detenu to the Advisory Board and if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the detenu, the State Government would be bound to revoke the detention order and release the detenu. That is the plain requirement of sub-section (2) of section 12. Now, suppose that in such a case the State Government fails to revoke the detention order and release the detenu in breach of its statutory obligation under sub-section (2) of section 12. Can the detenu not enforce this statutory obligation by filing a petition for a writ of *mandamus*? The answer must obviously be he can. When he files such a petition for a writ of *mandamus*, he would be enforcing his statutory right under sub-section (2) of section 12 and the enforcement of such statutory right would not be barred by the Presidential Order specifying Article 21. The Presidential Order would have no operation where a detenu is relying upon a provision of law to enforce a legal right conferred on him and is not complaining of absence of legal authority in the matter of deprivation of his personal liberty....

I may also refer by way of another illustration to section 57 of the Code of Criminal Procedure, 1973. This section provides that no police officer shall retain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a magistrate under section 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate's Court. There is clearly a legal injunction enacted by this section requiring a police officer not to detain an arrested person in custody for a period longer than 24 hours without obtaining a special order of a magistrate and to release him on the expiration of such period of 24 hours, if in the meantime such special order is not obtained. If, in a given case an arrested person is detained in custody by the police officer for a period longer than 24 hours without obtaining an order of a magistrate, can he not apply

to the magistrate that he should be directed to be released by the police officer under section 57? Would such an application be barred by a Presidential order specifying Article 21? I do not think so. When the arrested person makes such an application, he seeks to enforce a statutory obligation imposed on the police officer and statutory rights created in his favour by section 57 and that would not be barred, because what is suspended by a Presidential Order specifying Article 21 is the right to move the Court for enforcement of the fundamental right conferred by that Article and not the right to move the Court for enforcement of the statutory right to be released granted under section 57.

I may take still another example to illustrate the point I am making. Take a case where an order of detention has been made without a declaration under sub-section (2) or sub-section (3) of section 16-A. Sections 8 to 12 would admittedly apply in such a case and under section 8, the detaining authority would be bound to communicate to the detenu the grounds on which the order of detention has been made and to afford him the earliest opportunity of making a representation to the appropriate Government. If, in a given case, the detaining authority declines to furnish the grounds of detention to the detenu or to afford him an opportunity of making a representation, in violation of the statutory right conferred on him under section 8, can the detenu not enforce this statutory right by filing a petition for a writ of *mandamus* against the detaining authority? Would it be any answer to such an application that the enforcement of the fundamental right conferred by Article 22, clause (5) has been suspended by the Presidential Order? The answer is plainly: No. There are two rights which the detenu has in this connection: one is the fundamental right conferred by Article 22, clause (5) and the other is the statutory right conferred by section 8. Though the content of both these rights is the same, they have distinct and independent existence and merely because enforcement of one is suspended, it does not mean that the other also cannot be enforced.

These observations leave no room for doubt that when a person seeks to challenge an infraction of a positive statutory provision he is not asking for the enforcement of a fundamental right even though the content of the two be the same. And if that be so, the objection raised by the learned Advocate-General cannot be sustained. What the petitioners pray for in the petitions before me is that the action of the respondents in demanding security under a rule which runs counter to section 22 of the Act be struck down on the ground of patent illegality which cannot be equated with an attempt to enforce a fundamental right even though the fields in which section 22 of the Act and the fundamental right of trade operate are overlapping. The continuance of the Proclamation and of the Presidential Order therefore does not stand in the way of the entertainment of the petitions before me, and the objection to the contrary is overruled.

4. On the merits the petitioners have an unanswerable case. Section 22 of the Act having laid down the manner in which security must be demanded and furnished the rule-making authority cannot frame any rule which prescribes a different manner in that behalf. As pointed out by learned counsel for the petitioner, the question of demanding security in a particular case and of its amount is left by the section entirely to the Collector so that no rule can prescribe that security shall be furnished in all cases, that it shall be furnished at a particular rate based on the quantity of the commodity covered by the licence in each case and that the Collector would have nothing to do with these matters. Clause (vii) of rule 9 of the Rules therefore is *ultra vires* of section 22 of the Act and any action taken in pursuance of it must be held to be illegal.

5. In the result, all the petitions succeed and are accepted. The notification issued by the Government of Tamil Nadu on the 31st March, 1975, is held to be

of no effect and the Government and its concerned authorities, who are the respondents before me, are directed not to implement the provisions of the impugned clause. The parties are however left to bear their own costs.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*Ramanujam, J.*

M/s. Southern Roadways Limited, successors-in-interest M/s. Southern Roadways (Private), Ltd., Madurai .. *Petitioner**

v.

The Assistant Commissioner, Urban Land Tax, Tiruchirapalli South, Tiruchirapalli .. *Respondent.*

Cause title accepted as such by order of the Deputy Registrar dated 10th December, 1975 (vide order on the affidavit)

Tamil Nadu Urban Land Tax Act (XII of 1966), section 20—Fixation of market value—Number of sale deeds produced by assessee—Rejection by Assessing Officer without any basis—Appeal to Tribunal by assessee—Tribunal's failure to consider the documents —Merely adopting the data sale — Disposal not proper and judicial.

The assessing authority under the Tamil Nadu Urban Land Tax Act being a statutory body cannot arbitrarily without any reason, reject the sale deeds of lands admittedly situate in and around the locality where the lands in question are situate. If the assessing authority ignores certain sale deeds merely on the ground that they do not represent the correct market price, it gives an impression that since the price referred to in the sale deeds does not suit his valuation, he is ignoring them. This is not the proper approach to be made. Each one of the documents has to be considered to find out whether the sale deed can be taken as the proper basis for ascertaining the market value of the disputed land. The arbitrary rejection of the sale deeds of lands in and around the locality by the assessing authority has not been touched upon by the Tribunal. If the statutory Appellate Authority fails to consider relevant material placed before it, disposal of the appeal cannot be said to be proper and judicial. Since the Tribunal has failed to consider the relevant documents filed referred to by the petitioner both before the assessing officer and before the Tribunal, the appellate order cannot legally be sustained.

[*Para.* 2.]

Petition under Article 227 of the Constitution of India against the order of the Special Tribunal for Urban Land Tax Appeals Madurai, Camp at Tiruchirapalli, dated 23rd July, 1975 and made in U.L.T.A. No. 101 of 1973 [Case No. 1/14/1 and 32/24/1 (1 and 32/15K)], Assistant Commissioner, Urban Land Tax, Tiruchirapalli South, Tiruchirapalli.

A. Devanathan, for Petitioner.

The Assistant Government Pleader, for State.

The Court delivered the following

JUDGMENT:—The petitioner-Company owns, among others two items of properties (1) an extent of 17 grounds 1050 sq. feet in T.S. No. 46/1, Block No. 14 of Ward No. 1, and (2) 3 kanis 1 ground and 1362 sq. feet in old T.S. No. 121, Block No. 24 of Ward No. 1 of Tiruchirapalli. These two items of properties had been assessed to tax under the Tamil Nadu Urban Land Tax Act, 1966, by the Assistant Commissioner, Urban Land Tax, Tiruchirapalli. He has determined the market value of item No. 1 at Rs. 10,800 per ground and item No. 2 at Rs. 12,000 per ground as against the petitioner's return fixing the market value of item No. 1 at Rs. 3,000 and item No. 2 at Rs. 3,600.

2. The assessment was taken on appeal to the special Tribunal constituted under

* C.R.P. No. 3190 of 1975. *28th June,* 1977.

section 20 of the Act. In that appeal, the petitioner filed a list of sale deeds as well as the copies thereof to establish his case that the value fixed by the assessing authority for the two items of lands is highly excessive and it has no relevance to the actual market value of the two items in question or any of the lands in or around the locality. The Tribunal, however, without referring to any of the sale-deeds filed by the petitioner, reduced the market value of item No. 1 to Rs. 6,000 and item No. 2 to Rs. 8,000 per ground. The petitioner has now questioned the order of the Tribunal mainly on the ground that the Tribunal has not considered the various sale-deeds filed and relied on by the petitioner before it and that the Tribunal has merely adopted the data sale which the assessing authority has taken as comparable to the two items of land. The learned counsel for the petitioner points out that the assessing authority has rejected, without any basis, a considerable number of sale deeds in and around the locality executed round about 1st July, 1971 and has taken a sale deed of a land which is a mile away from the lands in question as a 'data sale'. merely because it showed a higher price than the price indicated in the various sale deeds of properties in and around the locality. When the main grievance of the petitioner in his appeal before the Tribunal, is that the assessing authority is not justified in ignoring the sales in the locality and adopting a sale of a land a mile away from the disputed lands in question as data sale, the Tribunal without going into that question, has merely accepted the basis adopted by the assessing authority to reduce the market value by taking into account some other factors. It is the submission of the learned counsel for the petitioner that in ascertaining the market value of a land on a particular date, the sale of similar lands in the same locality at the relevant date can alone be taken as the basis and that this principle is well established in cases arising under the Land Acquisition Act. It is pointed out by the learned counsel that in this case, the assessing authority referred to as many as 13 sales in Ward No. 1, Block No. 14 and 6 sales in Ward No. 1 Block No. 24 but chose to reject them on the ground that they do not represent the correct trend of the market price as on 3rd July, 1971. After rejecting these sale deeds, which are of comparable lands in and around the locality, the assessing authority took a sale in respect of a land situate in T.S. No. 100 which is said to be far away from the lands in question. It is also pointed out by the learned counsel that when the order of the assessing authority was challenged on the ground that it wrongly rejected the sale deeds of comparable lands in and around the locality where the lands in question are situate, the Tribunal has not considered that question, but proceeded to adopt the same basis as was adopted by the assessing authority, though it reduced the market value slightly. According to the learned counsel, the special Tribunal constituted under section 20 of the Act is a judicial Tribunal and its approach to the determination of the market value of the land should be judicial and therefore, it should have gone into the question as to whether the assessing authority was justified in rejecting the sale deeds of properties in and around the locality and taking a sale of a plot which is far away and which is not at all comparable to the lands in question. After going through all the materials including the copies of the sale deeds produced by the petitioner before the Tribunal, I am clearly of the view that there has been no proper disposal of the appeal by the Tribunal as it has merely proceeded to slightly reduce the market value fixed by the assessing authority without giving any basis. As already stated, even the assessing authority refers to as many as 19 sale deeds with reference to the lands in the same ward bearing T.S. Nos. 45 and 46 in Block Nos. 14 and 125 in Block No. 24. The assessing authority merely held that these documents do not represent the correct trend of the market price as on 3rd July, 1971. Why these documents do not represent the correct market price, has not been explained. Neither the vendors nor the vendees connected with those sale deeds have been examined by the assessing authority. There is no material from which the assessing authority could have con-

cluded that the price mentioned in those sale deeds did not represent the market price. The assessing authority being a statutory body cannot arbitrarily, without any reason, reject the sale deeds of lands which are admittedly situate in and around the locality where the lands in question are situate. If the assessing authority ignores certain sale deeds merely on the ground that they do not represent the correct market price, it gives an impression that since the price referred to in the sale deeds does not suit his valuation, he is ignoring them. This is not the proper approach to be made. Each one of the documents has to be considered to find out whether the sale deed can be taken as the proper basis for ascertaining the market value of the disputed land. This arbitrary rejection of the sale deeds of lands in and around the locality by the assessing authority, has not been touched upon by the Tribunal. The assessing authority has adopted a sale of 4396 sq. feet for a sum of Rs. 13,188 in document No. 2920 dated 5th June, 1970 in T.S. No. 100 as the "data sale" as giving the correct basis for fixing the market value of the land in question. This data sale adopted by the assessing authority as seen from the sketch prepared by the assessing officer himself, is in respect of a land situate far away from the locality and it is situate in Block No. 22. The case lands are situate in Block No. 14 and Block No. 24 of Ward No. 1. The data land is situate in Block No. 22 which does not abut either Block No. 14 or Block No. 24. The petitioner further contends that the sale deeds filed by him before the assessing authority as well as before the tribunal relating to sales of lands just opposite or near the lands in question had not been considered by them even though those documents will give the proper basis for fixing the correct market value. The list of documents filed by the petitioner and the documents filed find a place in the.......... Tribunal's file produced before this Court. A bare look at the order of the Tribunal indicates that none of those documents was considered by the Tribunal. If the documents referred to in the list and filed by the petitioner relate to the lands very close to the case lands then they will provide a proper basis for ascertaining the market value of the case lands. According to the petitioner document No. 463 of 1971 dated 6th February, 1971 relating to Mr. Cherian's property which is just opposite to the case land gives Rs. 1-25 per sq. foot and this document, though heavily relied on by the petitioner before the assessing authority as well as before the Tribunal, has not been touched upon by them. The learned counsel also refers to the relevancy of the other documents filed before the Tribunal. Document No. 1386 of 1972 dated 10th March, 1972 belonging to Sangam Hotel property which is also situate very close to the case land furnishes the market price at Rs. 1.52 per sq. foot. Document No. 1533 of 1971 dated 15th April, 1971 relating to the lands in Sri. T. Desikachari Compound has also been referred to and the price furnished by the document is Rs. 2 per sq. foot. I have not referred to the other documents set out in the list of documents filed by the petitioner before the Tribunal and I have referred to only a few of them to show that the relevant document filed by the petitioner to indicate the correct market price of the lands in the locality has not been considered either by the assessing authority or by the Tribunal. If the statutory appellate authority fails to consider a relevant material placed before it, the disposal of the appeal cannot be said to be proper or judicial. Since the Tribunal has failed to consider the relevant documents filed and referred to by the petitioner both before the assessing officer and before the Tribunal, the appellate order cannot be legally sustained. The order of the Tribunal has, therefore, to be set aside and it is, accordingly set aside with a direction to the Tribunal to dispose of the appeal after taking into account the various sale deeds filed by the petitioner and after considering the question as to whether the rejection of as many as 19 sale deeds referred to in the assessing authority's order, without any reason, is justified.

The civil revision petition is, therefore, allowed with costs and remanded as set out above.

R.S. —— *Revision allowed and remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*A. D. Koshal, J.*

Sri Tirumeni Alagar Devasthanam, represented by its Hereditary Trustee, Sri M. Muthu Thiagaraja Chettiar .. *Petitioner**

v.

The State of Tamil Nadu, represented by the Secretary, Home Department, Fort St. George, Madras and another .. *Respondents.*

(A) *Land Acquisition Act (I of 1894), sections 4 (1), 5 (A) and 17—Acquisition of land—Providing house sites for the poor—Notice of substance of notification not given simultaneously with publication in the locality—Effect*

(B) *Non-mention of the term "poor" in notification not invalidating notification—Non-existence of urgency for acquisition—Dispensing with provisions of section 5-A not justified.*

Landless workers are presumably poor persons whose case is covered by item C of section 17 (4) (*b*) (*ii*) so that it was legitimate for the State Government to act under sub-section (4) of section 17 of the Act. Non-mention of the term "poor" in the notification would not render the notification invalid. [*Para.* 5.]

Where urgency for the acquisition is not shown the provisions of section 5-A inviting objections etc., cannot be dispensed with. [*Para.* 6.]

Section 4 (1) of the Land Acquisition Act does not in so many words say that the publication of a notification in the Official Gazette and the giving of notice of its substance in the locality in which the acquired land was situated were to be simultaneous. But that is what has been held by the Supreme Court in *Narinderjit Singh* v. *State of U.P.*, (1973) 2 S.C.J. 378 : A.I.R. 1973 S.C. 552. Hence the failure of the authorities to give a notice of the substance of the notification simultaneously with the publication thereof renders the notification itself illegal. [*Para.* 7.]

Cases referred to :

Varadaraja Gounder v. *State of Tamil Nadu*, (1973) 86 L.W. 749 : (1973) 1 M.L.J. 408 : A.I.R. 1973 Mad. 278; *Periathambi Mudaliar* v. *Special Tahsildar (L.A.)*, I.L.R. (1965) 2 Mad. 416: A.I.R. 1965 Mad. 328; *Narinderjit Singh* v. *State of U.P.*, (1973) 2 S.C.J. 378 : (1973) 2 S.C.R. 698 : A.I.R. 1973 S.C. 552.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the 1st respondent's notification G.O.R. No. 258, Housing 15th June, 1973 and quash the same.

M. Srinivasan, for Petitioner.

G. Chinnaswami, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—Land belonging to the petitioner was acquired by the Special Deputy Collector (Rural Housing Schemes), Tiruvarur (hereinafter referred to as the Collector) for the purpose of providing house sites to landless workers. The notification under section 4 (1) of the Land Acquisition Act (hereinafter referred to as the Act) was published on the 4th of July, 1973. It provided *inter alia*:

> "....Under sub-section (4) of section 17 of the Act, the Governor of Tamil Nadu hereby directs that in view of the urgency of the case, the provisions of section 5-A of the said Act shall not apply to this case."

2. Simultaneously a declaration under section 6 of the Act was also published

*W.P. No. 6002 of 1973. 16th November, 1976.

3. By this petition under Article 226 of the Constitution of India the petitioner seeks the issuance of a writ of *certiorari* quashing the acquisition proceedings.

4. In support of the petition only three contentions are raised:

(1) The provision of house sites for landless workers was not a purpose which could attract the relevant emergency clause of sub-section (2) of section 17 of the Act.

(2) In fact, there was no urgency about the acquisition proceedings and the provisions of section 5-A of the Act could not be dispensed with.

(3) No notice of the substance of the notification issued under sub-section (1) of section 4 of the Act was given in the locality in which the acquired land was situated so that an imperative requirement of the sub-section was not fulfilled, with the result that the entire acquisition proceedings including the said notification stood vitiated.

5. According to the case set up on behalf of the Collector it is item (C) of sub-clause (*ii*) of clause (*b*) of sub-section 2 of section 17 of the Act which is relevant in relation to the first contention. That item provides that whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land for the construction, extention or improvement of any dwelling house for the poor, the Collector may immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of the land. Sub-section (4) of section 17 of the Act states:

"(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if, it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1)."

According to learned counsel for the Collector the landless workers for whom house sites were proposed to be provided from the acquired land were obviously poor persons whose case was covered by item (C) so that the provisions of sub-section (4) of section 17 of the Act would come into play. This stand, in my opinion, is well-founded. Merely because the word 'poor' is not used in the notification it would not render the notification invalid. Landless workers are presumably poor persons and the item applies to them so that it was legitimate for the State Government to act under sub-section (4) of section 17 of the Act. The first contention is thus found to be without substance.

6. The second contention raised on behalf of the petitioner is not without substance. No material has been placed before me such as might indicate the existence of any urgency for the acquisition. In this connection, what the counter-affidavit filed by the Collector says is:

"The Government of India have formulated the scheme to provide the basic amenity of a dwelling site to all landless poor workers in the villages and the Government of Tamil Nadu have taken a policy decision to ameliorate the conditions of rural workers as an emergency measure on a war-footing".

This is hardly a reason on the basis of which the provisions of section 5-A of the Act might be dispensed with. The inviting of objections under that section and their determination after enquiry normally takes no more than a period of a couple of months or so. The urgency therefore has to be such that the acquisition cannot brook that much delay, which does not appear to be true of the case in hand. I may mention here that although this petition was filed on the 14th of November, 1973, *i.e.*, four months after the issuance

of the notification under section 4 of the Act, the counter-affidavit of the Collector which is dated 22nd of August, 1975 makes no mention of any steps having been taken at any time till the date last mentioned towards the allotment of any sites out of the acquired lan . to any landless of worker. Had the urgency been real, steps would surely have been taken to prepare a layout plan of the acquired land and to allot sites therefrom to the landless workers for whom they were meant. The inaction on the part of the Collector in that behalf knocks out the plea of urgency. So far as this Court is concerned, it has been repeatedly held that in such a situation the acquisition proceedings cannot be allowed to stand (vide *Varadaraja Gounder v. State of Tamil Nadu*[1] and *Periathambi Mudaliar v. Special Tahsildar (L.A.) Planning Scheme, Coimbatore*[2].

7. The third contention must also prevail. On behalf of the State it is asserted that notice of the substance of the notification was given in the locality in which the acquired land is situated, but it is conceded on its behalf that such notice was given after the lapse of a considerable period of time from the publication of the notification under sub-section (1) of section 4 of the Act in the Official Gazette. That section itself does not in so many words say that the publication of a notification in the Official Gazette and the giving of the notice of its substance in the locality where the acquired land is situated have to be simultaneous. But that is what has been held by their Lordships of the Supreme Court in *Narinderjit Singh v. State of U.P.*[3], In this connection learned counsel for the State contends that in the present case the filing of objections under section 5-A of the Act was dispensed with by resort to the provisions of sub-section (4) of section 17 thereof, that the only purpose of the giving of a notice in the locality is to appraise the inhabitants there of, of the publication of the notification in the Official Gazette and of its contents, that when objections under section 5-A are not to be filed, the requirement about giving of the notice in the locality becomes redundant and that therefore the failure of the authorities to give such notice would be of no effect and would not render either the notification or part of the proceedings illegal. An identical contention was raised in *Narindrajit Singh's case*[1] and was rejected an untenable with the observation that the requirement of the giving of notice in the locality has to be fulfilled, whether are not the provisions of section 5-A of the Act are dispensed with. Thus, by reason of the failure of the authorities to give a notice of the substance of the notification simultaneously with the publication thereof, the notification itself is rendered illegal.

8. In the result, the petition succeeds and is accepted and the acquisition proceedings including the notification issued under sub-section (1) of section 4 of the Act are quashed. There will, however, be no order as to costs.

R.S. — *Petition allowed.*

1. (1973) 86 L.W. 709 : (1973) 1 M.L.J. 408 : A.I.R. 1973 Mad. 278.
2. I.L.R. (1965) 2 Mad. 416 : A.I.R. 1965 Mad. 328.
3. (1973) 2 S.C.J. 378 : (1973) 2 S.C.R. 698 : A.I.R. 1973 S.C. 552.

1. (1973) 2 S.C.J. 378: (1973) 2 S.C.R. 698: A.I.R. 1973 SC 552.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—C. J. R. Paul, J.

K. M. S. Abdul Hasan .. Appellant*

v.

The Tiruvarur Municipality, represented by its Commissioner, Municipal Office, Tiruvarur .. Respondent.

Tamil Nadu District Municipalities Act, (V of 1920), sections 82 (2) and 254—Property tax revision—Annual rental value of building arbitrarily fixed—Assessment not valid.

Under section 82 (2) of the Tamil Nadu District Municipalities Act, provision has been made for the fixation of annual rental value according to the rent at which the lands and buildings may reasonably be expected to be let from month to month or year to year less the specified deductions. The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The Municipality is not free to assess any arbitrary value and has to look to and is bound by the fair or standard rent which would be payable for a particular premises under the Rent Control Act in force. In this respect no distinction can be made between buildings the fair rent of which has been actually fixed under the Rent Control Act and those in respect of which no such rent has been fixed. [Para. 7.]

Held: In the present case the Commissioner has arbitrarily fixed though in a *bona fide* manner the reasonable rent that the properties would fetch. The annual rental value has not been arrived at in conformity with the proper principles applicable. [Para. 7.]

Case referred to:

Guntur Municipal Council v. *The Guntur Town Ratepayers Association, etc.*, (1971) 2 M.L.J. (S.C.) 7.

Appeal against the decree dated 21st April, 1972 of the Court of the Subordinate Judge, Nagapattinam in Appeal No. 43, 44 of 1971 preferred against the decree of the District Munsif, Tiruvarur in original suit No. 81 of 1966, dated 29th April, 1970.

T. R. Venkataraman, for Appellant.

K. Alagiriswamy, for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is the owner of Door Nos. 58, 16 and 16-A-1, situate in Vijayapuram within the Municipal limits of Tiruvarur. The appellant is living in Door No. 58 and he has rented out Door Nos. 16 and 16-A-1. Till 1st April, 1965, the assessment for Door No. 58 was Rs. 144 and the property tax payable is Rs. 14-89 while the assessment for Door No. 16 was Rs. 840 and the property tax payable for it was Rs. 87-04 and the assessment for Door No. 16-A/1 was Rs. 192, and the property tax payable for it is Rs. 19-89. In the month of March 1969 however, the respondent Municipality, issued special notices proposing to increase the assessments, in respect of these three buildings to Rs. 360, Rs. 1,200 and Rs. 840 respectively and to increase the property tax to Rs. 37-30, Rs. 124-34 and Rs. 87-04, respectively. The appellant filed revision petition obejcting to the proposed enhancements but these revision petitions were dismissed whereupon the appellant filed appeals to the Municipal Council but they were also dismissed. In these circumstances, the appellant filed a suit O.S. No. 81 of 1966 before the learned District Munsif, Tiruvarur, for a declaration that the increase in the assessment was illegal and for a permanent injunction restraining the Municipality from taking coercive steps against the appellant contending that the notice served under rule 6 did not conform to the provisions of the Madras District Municipalities Act (hereinafter called the Act) either in substance or in effect and the increase in the assessment was arbitrary, excessive, unreasonable, oppressive and discriminatory and that therefore there should be a declaration that the increase in assessment was void and unenforceable and permanent injunction restraining the Municipality for enforcing the payment of the tax by the appellant in accordance with the revised assess-

*S.A. No. 352 of 1973.

5th November, 1976.

ment for the half yearly ending in October, 1965 and March, 1976.

2. The respondent-Municipality resisted the suit contending that on inspection of these buildings it was found that they were under the assessee and consequently the annual rental value of the buildings was refixed having regard to the letting value of the buildings and special notices were duly issued and the objections of the appellant were considered by the Commissioner and only thereafter the revised assessment was made and the appellant who should have remitted the tax assessed and preferred the appeals to the council filed appeals to the council without remitting the tax assessed and consequently the appeals were dismissed and the assessment has become final and it is not open to the appellant to re-agitate the matter in a civil Court action and the suit was found to be dismissed as barred under the provisions of the District Municipalities Act.

3. The learned District Munsif found that the increase of assessment in respect of Door No. 58 was not valid but so far as the assessment in respect of Door Nos. 16, 16-1 were concerned they were quite valid. He further found that the suit in respect of Door No. 16 and 16-A-1 was barred while the suit in respect of Door No. 58 was not barred under section 354 of the Act. On these findings the learned District Munsif passed a decree declaring that the increase of assessment for Door No. 58 and the tax demands in pursuance of it was illegal and granting permanent injunction restraining the respondent from taking coercive steps against the appellant from enforcing the increased assessment in respect of Door No. 58.

4. The respondent-Municipality thereupon preferred appeal Suit No. 43 of 1971 while the appellant filed A.S. No. 44 of 1971 in the Court of the Subordinate Judge, Nagapattinam, against the judgment and decree of the learned District Munsif. The learned Subordinate Judge however, found that revised assessments of the three buildings were valid and the suit was barred under section 354 of the Act and he allowed A.S. No. 43 of 1971 preferred by the Municipality, in regard to the validity of the assessment in respect of Door No. 58 and dismissed A.S. No. 44 of 1971 which related to the validity of the assessment on Door No. 16 and 16-A-1. Hence the appellant has preferred this second appeal contending that the respondent Municipality has failed to follow the procedure according to law, for arriving at the annual rental value of the several buildings as laid down by the Supreme Court in the *Guntur Municipal Council* v. *The Guntur Town Rate-payers Association etc.*[1], and as such both the Courts should have held that the increase in the assessment and the levy of increased tax in pursuance of that assessment were illegal and opposed to law.

5. Section 82 (2) of the Act which relates to the method of assessment of property provides that the annual value of the lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let out from month to month or year to year less a deduction in the case of buildings of ten per cent. of that portion of such annual rent which is attributable to the lands occupied as an appurtenant thereto. Section 354 (1) of the Act provides that no assessment or demand made and no charge imposed under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake: (*a*) in respect of the name, residence place of business or occupation of any person or (*b*) in the description of any property or thing or (*c*) in respect of the amount assessed, demanded or provided, that the provisions of this Act had been in substance and effect complied with. The rules which have relevance to this case are rules 6 to 10 of the Taxation Rules in Part I of Schedule IV. Rule 6 provides that the value of any land or building for purpose of the property tax shall be determined by the executive authority. Rule 7 provides that the executive authority shall enter the annual or capital value of all lands and

1. (1971) 2 M.L.J. (S.C.) 7.

buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal office. Rule 8 (1) stipulates that the assessments books shall be completely revised by the executive authority once in every five years. Sub-rule (2) of the rule 8 provides that the executive authority may amend the assessment books at any time between one general revision and another. Rule 9 lays down that when assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the executive authority shall give public notice stating that the revision petitions will be considered if they reach the Municipal office within a period of thirty days. The first proviso to that Rule reads that every case where there is an enhancement in the assessment the executive authority shall also cause intimation thereof to be given by a special notice to be served on the owner or occupier of the property concerned. Rule 10 provides that in every case in which between one general revision and another the executive authority assess any property for the first time or increase the assessment on any property otherwise than in consequence of a general enhancement of the rate at which the property tax is leviable the executive authority shall intimate by a special notice to the owner or occupier of the property concerned. Rule 10 provides that in every case in which tax is leviable the executive authority shall intimate by a special notice to the owner or occupier of such property that a petition for revising the assessment will be considered if it reaches the municipal office within thirty days. Rule 11 lays down that any person may at any time not being less than thirty days before the end of the half year move the executive authority by revision petition to reduce the tax which he is liable to pay for the fourth coming half year on the ground that the annual or capital value of the property in respect of which the tax is payable and imposed has decreased since the assessment of the property was last made or reduced. Rule 23 provides for appeal to the council against the order of the executive authority under rule 13 by a revision petition. Rule 26 (B) stipulates that no appeal to the council shall be heard unless, except when the executive authority otherwise directs on the ground of poverty, the tax in respect of which the appeal is presented has been deposited at the Municipal office within the time stipulated in clause (*a*).

6. Section 354 of the Act reads as follows:

> "No assessment or demand made and no charge imposed under the authority of this Act shall be impeached or affected by reason of any clerical error by reason of any mistake (*c*) in respect of the amount assessed, demanded or charged provided that no provisions of this Act have been in substance or effect complied with".

Now in the present case the respondent Municipality took the quinquennial revision under rule 2. It accordingly issued a public notice Exhibit P-26 under rule 9. The Commissioner made a personal inspection of the premises and made enquiries and made assessment of the property for the purpose of annual rental valuation. The Commissioner found on inspection of the buildings that the existing assessment in respect of the three buildings, concerned in this case and belonging to the appellant were low and consequently the respondent-Municipality issued the special notice Exhibits A-1 to A-3, under Rule 10, revising the existing assessment and the amounts of the property tax payable. The appellant filed revision petitions under rule 12 contending that the revised assessment was without any basis. Those revision petitions were dismissed. The next remedy open to the appellant was therefore the remedy of appeal as provided under rule 26. He accordingly preferred appeals to the Municipal Council, but even though rule 20 (B) provides that no appeal to the Council shall be heard except when the executive authority otherwise directs on the ground of poverty the tax in respect of which the appeal is presented has been deposited at the municipal office within the time specified in clause (*a*), the appellant did not deposit the

tax before filing the appeal. He filed the appeals without depositing the tax at all. Consequently the appeals were rightly dismissed by the Municipal Council. Hence the appellant then came forward with the suit in question.

7. The only contention now raised in this second appeal is that the executive authority of the respondent-Municipality had not properly arrived at the annual rental value on the principles laid down by the Supreme Court in the *Guntur Municipal Council* v. *The Guntur Town Ratepayers Association*[1], but had arbitrarily arrived at the rental value. The Supreme Court has observed on that section as follows:

> Section 82 (2) of the Madras District Municipalities Act makes provision for the fixation of annual value according to the rent at which lands and buildings may reasonably be expected to be let from month to month or from year to year less the specified deduction. The test essentially is what rent the premises can lawfully fetch if left out to a hypothetical tenant. The Municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or the standard rent which would be payable for a particular premises under the Rent Control Act in force. In this respect no distinction can be made between buildings the fair rent of which has been actually fixed under the Rent Control Act and those in respect of which no such rent has been fixed.

In these case before me the Commissioner along with the Revenue Inspector who was examined as D.W. 1 visited the spot and found that Door No. 58 was a country-tiled electrified house occupied by Ramaswami brothers. Though the occupiers stated that the rent was Rs. 60 the Commissioner found that the premises would fetch an annual rent of Rs. 1,200. The Commissioner found that Door No. 16-A-1 was a country-tiled masonry structure which was electrified and he disbelieved the contentions of the appellant that it was let out at Rs. 15 and held that it would reasonably fetch an annual rent of Rs. 240. P.W. 1 during his cross-examination admitted that Ramaswami Mudaliar, to whom Door No. 16 had been let out in March, 1965 at a rent of Rs. 50 per month had sublet it to Rajavelu Brothers, who paid to him Rs. 125 per month towards rent. Further in Exhibit B-18, the copy of the plaint in O.S. No. 60 of 1967 filed by P.W. 1 against Rajavelu, P.W. 1 had alleged that the rent for Door No. 16 is Rs. 125 per month. Again the receipt Exhibit P-19 dated 24th September, 1962, given by P.W. 1 to one Thayyanayagi says that the rent for that premises was Rs. 95 per month and then Rs. 110 per month. In the case of Door No. 16-A-1. D.W. 2 Ramalingam who is running a hotel there stated that he was paying a rent of Rs. 60 per month. P.W. 1 however refuted that. This was all the material that was made available with regard to reasonable rent that the properties would fetch. Under those circumstances the Municipality should have arrived at the annual rental value in accordance with the principles laid down by the Supreme Court in the aforesaid case. On the other hand the Commissioner has arbitrarily fixed though in a *bona fide* manner the reasonable rent that the properties would fetch. Hence this appeal has to be allowed and the judgment of both the Courts below are set aside and the suit is decreed with costs. The appellant will be entitled to costs throughout.

R.S. —— *Appeal allowed.*

1. (1971) 2 M.L.J (S.C.) 7.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

K. Daniel Nadar and others .. *Appellants**

v.

R. Ananthan Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 11—*Suit for partition—Plaintiff party in another suit decided earlier—Issue not raised in earlier suit raised in the later suit—Plea of* res judicata *raised by defendants—Matter ought to have been considered in the earlier suit and deemed to have been a matter directly and substantially in issue in that suit—Decision in the earlier suit held to operate as* res judicata.

One *D* filed a suit for partition and separate possession of a portion of the suit properties on foot of a purchase by him from one *R.* The plea of the defendants was that the plaintiff *D* was a party to an earlier suit, O.S. No. 293 of 1120 M.E., and the plaintiff had a right to raise the issue therein which he failed to do. Accordingly, the decision in the earlier suit was held to constitute *res judicata. D's* suit was dismissed. On appeal, the lower appellate Court confirmed the decree of the the trial Court. On further appeal by the legal representative of the deceased *D*,

Held: Though the question of the validity and binding nature of the sale by Raman Pillai in favour of *D* and *D's* right to partition and separate possession of 2 acres in Survey No. 3020-*A* had not been specifically considered in O.S. No. 293 of 1120 M.E., it was a matter which ought to have been considered in the former suit and should be deemed to have been a matter which was directly and substantially in issue in that suit. The decision in O.S. No. 293 of 1120 M.E. as modified in A.S. No. 142 of 1953 and confirmed by S.A. No. 204 of 1959, was valid and binding on *D* and constituted *res judicata.* [*Paras* 25 *and* 26.]

*S.A. No. 362 of 1974. 15*th October,* 1976.

Cases referred to :

Seshayya Garu v. *Rajah of Pittapur,* (1916) 31 M.L.J. 219; *Damodhar Rao* v. *Bhima Rao,* A.I.R. 1965 Mys. 200; *Lakshmi Narasimhan* v. *Lakshmi Pathi,* A.I.R. 1931 Mad. 830; *Ramachandra Bahadur* v. *eazuddin,* (188.) I.L.R. 10 Cal. 856; *Ehrattennessa Bibi* v. *Sarat Chandra,* A.I.R. 1934 Cal. 14; *Bapanna* v. *Jaggiah,* A.I.R. 1939 Mad. 81; *Goripalayam Durga* v. *Kesavaswami Iyer,* (1949) 2 M.L.J. 153: (1949) M.W.N. 466; *Subba Reddiah* v. *Seetharaman,* (1972) 1 M.L.J. 497: A.I.R. 1972 Madras 421; *Venkatasubbayya* v. *Virayya,* 1956 An.W.R. 1082: I.L.R. (1956) A.P. 1076: A.I.R. 1957 A.P. 981.

Appeal against the decree of the District Court, Kanyakumari at Nagercoil in A.S. No. 335 of 1966 preferred against the decree of the Court of the Additional District Munsif of Kuzhithurai in O.S. No. 58 of 1964.

S. Padmanabhan, for Appellants.

The Court delivered the following

JUDGMENT.—The legal representatives of the plaintiff K. Daniel Nadar, who failed in both the Courts below are the appellants. Daniel Nadar filed the suit for partition and separate possession of 2 acres of land out of the suit property which is 13.12 acres in S. No. 3020-A of Ponmanai village, Kalkulam taluk. The allegation in the plaint was that one half of Survey No. 3020-A, the total extent whereof is 26 acres and 30 cents belonged to one Dr. John Hilkiah, who had been impleaded as the second plaintiff and legal representative of the first plaintiff in O.S. No. 293 of 1120 M.E. which was filed by the deceased first plaintiff Nakshatram Abaranam of Colachal Paguthi for partition of a half share, impleading the plaintiff Daniel Nadar as the 10th defendant. The other half share belonged according to the first plaintiff Nakshatram Abaranam to defendants 1 and 2—Ananthan Pillai and Velayudhan Pillai respectively and their maternal uncle Raman Pillai and they became divided as per Exhibit A-1 dated 13th November, 1097 M.E. Subsequently Raman Pillai's 1/2 acres in S. No. 3020-A to the plaintiff—Daniel Nadar under Exhibit A-2 dated the 5-11-1117 M.E. 16th June, 1947. Defendants 3 to

14 are enjoying the property— under defendants 1 and 2. There was a preliminary decree for partition of Dr. John Hilkiah's 1/4th share in the property. But on appeal, a preliminary decree for partition of a half share was passed in his favour by the appellate Court as per the judgment Exhibit A-5. In the final decree proceedings defendants 3 to 5 were impleaded without notice to the plaintiff Daniel Nadar, whose legal representatives are the appellants herein, and their shares were allotted on the basis of the sale deeds executed in their favour by the 2nd defendant, denying the share of Raman Pillai, who had been examined as D.W. 4 in the said suit O.S. No. 293 of 1120 M.E. The deceased plaintiff filed I.A. No. 952 (*a*) of 1958 for partition of his share of 2 acres in accordance with the direction in the preliminary decree passed as per the judgment Exhibit A-3 in O.S. No. 293 of 1120 M.E. But it was dismissed on 8th October, 1958 with a direction that he could file a separate suit for partition. The appellants' right to 2 acres of land as per the sale deed has to be declared and their shares partitioned.

2. The defence of defendants 1 and 11 to 14 was that S. No. 3020-A belonged to the tarwad of defendants 1 and 2 and was not enjoyed by Dr. John Hilkiah. Raman Pillai and defendants 1 and 2 were members of an undivided sub-tarwad in 1097 and 1117 M.E. The alleged sale by Raman Pillai, an undivided member of the tarwad, in favour of the plaintiff Daniel Nadar is not valid and binding on defendants 1 and 2 and he has not acquired any right to any portion of the property. There was no consideration for the sale or necessity for the tarwad to sell the property. Daniel Nadar did not get possession of the property in pursuance of the sale in his favour. Defendants 1 and 11 to 14 are entitled to 13 acres and 15 cents in the suit survey number. The first defendant has sold 3 acres out of it to strangers from whom defendants 6 and 7 have purchased it and are in possession. Defendants 1 and 11 to 14 have othied another two acres of land to defendants 8 to 10 under Exhibit B-16 dated 5th February, 1952 and those three defendants are in possession of the same. Raman Pillai had no heritable or alienable share in the suit property and the appellants who claim under a sale deed executed by him are not entitled to any interest in the property.

3. The defence of the second defendant was that the entire survey number 3020-A belonged to the tarwad of defendants 1 and 2. But Dr. John Kilkiah had managed to get a final decree for partition of a half share in O.S. No. 293 of 1120 M.E. Raman Pillai and defendants 1 and 2 did not get divided in 1097 M.E., but continued to be members of a sub-tarwad, and the sale by Raman Pillai is void *ab initio* as opposed to Nair Regulation. There was no necessity for the tarwad to sell the property to Daniel Nadar and the sale in his favour is not supported by consideration. Daniel Nadar did not get possession in pursuance of the sale and is not entitled to declaration and partition.

4. The defence of the third defendant was that he had purchased 4 acres in the suit survey number from the 2nd defendant on 17th May, 1962 under Exhibit B-4 and as 23rd defendant is O.S. No. 293 of 1120 M.E., he got his share, partitioned in the final decree passed in that suit. The shares of the third defendant and other defendants were duly considered in O.S. No. 293 of 1120 M.E., and a preliminary decree was passed. The present suit by the appellants' predecessor Daniel Nadar is barred by *res judicata* so far as plot No. 5 in the final decree is concerned.

5. The defence of the seventh defendant was that defendants 14 and 15 got plot No. 6 in the final decree proceedings allotted to their shares in O.S. No. 293 of 1120 M.E. and the seventh defendant has purchased the same from those two defendants. The allegation that the shares of the defendants in O.S. No. 293 of 1120 M.E. were not considered in that suit is false. The appellants have so right to question the shares allotted to the various defendants in O.S. No. 293 of 1120 M.E. The present suit is barred by *res judicata*.

6. The defence of defendants 8 to 10 was that defendants 1 and 2 and Raman

Pillai were not divided, and Raman Pillai was not competent to execute the sale deed in respect of any portion of the suit property in favour of Daniel Nadar. Daniel Nadar's right was only to prefer an appeal against the final decree in O.S. No. 293 of 1120 M.E. and he cannot question it in the present suit. The sale in favour of Daniel Nadar is *ab initio* void. Defendants 8 to 10 are mortgagees of 2 acres under the first defendant under a deed dated 5th December 1952 and they are in possession of 2 acres odd in the western portion of the suit survey number.

7. The trial Court found that the final decree passed in O.S. No. 293 of 1120 M.E. is not liable to be set aside on the ground that the deceased plaintiff Daniel Nadar was a party thereto and he has not filed any appeal against it. Exhibit B-17 is the judgment dated 28th November, 1957 in A.S. No. 132 of 1957 on the file of the Subordinate Judge's Court, Padmanabhapuram which arose out of O.S. No. 339 of 1954 filed in the District Munsif's Court, Padmanabhapuram by the second defendant in the present suit against the plaintiff-Daniel Nadar-for redemption of an othi executed by the second defendant in favour of Daniel Nadar. There it has been found that Raman Pillai and defendants 1 and 2 were members of an undivided sub-tarwad in 1117 M.E. and the sale deed executed by Raman Pillai in favour of Daniel Nadar was invalid as against the second defendant and the second defendant got 52 cents in the partition under a document which was Exhibit 'B' in that suit. On the basis of Exhibit B-17, the trial Court found in the present suit that Raman Pillai and defendants 1 and 2 were members of an undivided sub tarwad in 1117 M.E. and that Raman Pillai was not entitled to one-third share out of six acres. The trial Court further found that the sale under Exhibit A-2 in favour of Daniel Nadar was not for tarwad's necessity and it was not valid though it was for consideration. The trial Court held that the shares of defendants had been not considered in O.S. No. 293 of 1120 M.E. and that the present suit is not barred by *res judicata* by the judgment in O.S. No. 293 of 1120 M.E. on the ground that the question whether the appellant's predecessor Daniel Nadar are not entitled to any share was not considered in the preliminary decree or supplemental decree or final decree. But it found that the suit is barred by *res judicata* by the judgment Exhibit B-17 in which, as already stated, it has been found that Raman Pillai and defendants 1 and 2 were members of an undivided sub-tarwad and that the sale by Raman Pillai in favour of Daniel Nadar is not valid. The trial Court further found that the supplemental preliminary decree passed in I.A. No. 1634 of 1960 in O.S. No. 293 of 1120 M.E. is valid and binding on Daniel Nadar and the final decree passed in that suit is not liable to be set aside. In this view, the learned District Munsif found that the plaintiff Daniel Nadar is not entitled to any relief and dismissed the suit without costs.

8. On appeal, the only question that was urged before the learned District Judge and considered by him was whether there is any *res judicata*. In the appellate Court Exhibit A-17, the judgment dated 20th November, 1961 in O.S. No. 452 of 1960 on the file of the District Munsif's Court, Padmanabhapuram was produced. That suit was filed by the second defendant in the present suit against Daniel Nadar who was the 6th defendant and certain others including Dr. John Hilkiah who was the second defendant and the first defendant herein who was the second defendant in that suit. It was filed for setting aside the preliminary decree in O.S. No. 293 of 1120 M.E. and for declaring the title of the tarwad of defendants 1 and 2 and Raman Pillai to the entire suit survey number 3020-A. In that suit where the judgment Exhibit B-17 had not been produced, it was held that defendants 1 and 2 and Raman Pillai got divided *inter se* under Exhibit A-1. The learned District Judge in his judgment now under appeal held that Exhibit B-17 is earlier and of a superior Court and would therefore prevail over Exhibit B-17 and that the sale by Raman Pillai in favour of Daniel Nadar under Exhibit A-2 was by an undivided member of a tarwad and is not valid and binding on defendants 1 and 2. In that view, the learned District Judge confirmed the trial Court's decree and dismissed the appeal.

9. It is not disputed that Raman Pillai, who has sold 2 acres in the suit Survey number 3020-A to Daniel Nadar under Exhibit A-2 dated 5-11-1917 M.E. had an interest in the property and in the partition effected under Exhibit A-1 dated 13-1-1097 M.E. Raman Pillai and defendants 1 and 2 got the C. Schedule properties including 13.15 acres out of 26.30 acres comprised in Survey No. 3020-A. The portion allotted to their share in the suit survey number is item 20 in the C Schedule properties in Exhibit A-1. According to Exhibit A-1, Raman Pillai was given absolute powers to alienate items 1 and 24 and with regard to the other items, the provision in Exhibit A-1 is that if there was any necessity to borrow money on a charge over the other properties, Raman Pillai and defendants 1 and 2 shall jointly execute documents and borrow monies, if the borrowing was necessitated for the purpose of redeeming some othies or to file suits to set aside unlawful alienations. In view of this provision, it was faintly contended before me on behalf of the contesting respondents that Raman Pillai had no right at all to alienate any portion of the suit survey number by Exhibit A-2. But no such contention had been taken in the Courts below and the provisions in Exhibit A-1 for defendants 1 and 2 also joining in the execution of othies over other items of properties if there was any necessity to borrow any money on the charge of any of the other items of properties would amount to a clog on alienation and would not be valid. The contention of the contesting respondents is that Raman Pillai was only an undivided member of a sub-tarwad at the time of the execution of the sale deed Exhibit A-2 and that the sale under Exhibit A-2 was not for consideration or for tarwad necessity and was not valid and binding on defendants 1 and 2. The trial Court has found that the sale under Exhibit A-2 was for consideration. The learned District Judge has not gone into that question. The question for consideration is whether Raman Pillai was a member of a sub-tarwad on the date of Exhibit A-2 and he was not competent to convey any portion of his interest in the suit survey number to Daniel Nadar under Exhibit A-2.

10. Daniel Nadar who was the 10th defendant in O.S. No. 293 of 1120 M.E. had contended in his written statement in that suit that he was entitled to 2 acres out of the suit survey number by right of purchase under the sale deed Exhibit A-2 and that his share of two acres should therefore be divided in that suit. The question whether Daniel Nadar had become entitled to two acres in the suit survey number by right of purchase under Exhibit A-2 from Raman Pillai was not specifically considered in O.S. No. 293 of 1120 M.E. The second defendant in the present suit filed O.S. No. 393 of 1954 in the District Munsif's Court, Padmanabhapuram, against Daniel Nadar for redemption of an othi executed by him in favour of Daniel Nadar over one-fourth share in the property forming the subject-matter of that suit. On the same date, Anandan Pillai, the first defendant in the present suit and Raman Pillai had executed another mortgage in favour of Daniel Nadar over the remaining portion of the property. The second defendant as the plaintiff in that suit alleged in his plaint in that suit that in a subsequent partition arrangement between all the three of them, namely, Raman Pillai and defendants 1 and 2, he got 52 cents in the property and was therefore entitled to redeem the same. The defence was that the second defendant herein was entitled only to one-fifth share and the remaining 4/5th share belonged to Raman Pillai and the first defendant, and Daniel Nadar purchased 2/5th share from Raman Pillai and surrendered the remaining 40 cents to the first defendant and that the partition referred to in the plaint in that suit did not take effect and was brought about only to defeat the rights of Daniel Nadar. The second defendant herein contended in his reply statement in that suit that the sale by Raman Pillai in favour of Daniel Nadar was void and he was therefore entitled to redeem the 52 cents as prayed for by him. It is seen from the judgment Exhibit B-17, dated 28th November, 1957 in A.S. No. 132 of 1957 on the file of the Sub-Court, Padmanabhapuram which arose out of the decree in O.S. No. 339 of 1954 that the trial Court held that at the time of the mortgages over one-fifth share and 4/5th

share, the second defendant herein and his brother the first defendant got divided, that the partition under Exhibit 'B' in that suit pleaded by the second defendant herein whereby he claimed to have got 52 cents would be valid only in respect of other items and not in respect of the items covered by the mortgages and that the second defendant herein was entitled to redeem only an one-fifth share in the property as contended by Daniel Nadar on payment of mortgage amount and the value of the improvements. But the appellate Court found in Exhibit B-17 that the conclusion of the trial Court regarding the partition under Exhibit 'B' in that suit was not correct and that there was no partition prior to the date of Exhibit 'B' between Raman Pillai and defendants 1 and 2 and they continued to be joint until the date of Exhibit 'B' of the year 1921 and that the sale by Raman Pillai in favour of Daniel Nadar under Exhibit 1 in that suit in the year 1117 M.E., (Exhibit A-2 herein) was without the consent of defendants 1 and 2 herein and was invalid against the second defendant herein and that the second defendant herein got 52 cents in the partition under Exhibit 'B' in that suit and it took effect and he was therefore entitled to redeem 52 cents as prayed for in that suit. Exhibit A-17 is the judgment in O.S. No. 452 of 1960 on the file of the District Munsif's Court, Padmanabhapuram, a suit filed by the second defendant herein against certain persons including Dr. John Hilkiah, Anandan Pillai (first defendant herein) and Daniel Nadar (who were defendants 1, 2 and 6 respectively) in that suit for declaration of his title and for possession of the property after setting aside the decree in A.S. No. 142 of 1953 on the file of the Subordinate Court, Nagercoil, which was filed against the decree in O.S. No. 293 of 1120 M.E. as confirmed by this Court in S.A. No. 204 of 1958 and for an injunction restraining the Court from passing a final decree in O.S. No. 93 of 1120 M.E. But Dr. John Hilkiah, the first defendant in that suit contended that the plaintiff and the second defendant in that suit, defendants 1 and 2 respectively in the present suit had nothing more than one half share in items 1 and 2. The finding in that suit was that the suit was barred by *res judicata* by the decision in O.S. No. 293 of 1120 M.E. and that suit was not maintainable, that the decree in O.S. No. 827 of 1108 M.E. on the basis of which the decree for a half share in the suit survey number had been granted in favour of defendants 1 and 2 herein in O.S. No. 293 of 1120 M.E. is binding on the second defendant herein (plaintiff in that suit and that the properties involved in that suit do not belong to the tarwad of the plaintiff therein and the 2nd defendant and there was no tarwad as alleged. It was further found in that suit that even in the partition deed of 1097 M.E. that had been filed in that Court as Exhibit A-3, it is clearly seen that the minor defendants 1 and 2 were represented by their father while they ought to have been represented by Raman Pillai as their guardian if they were members of a tarwad and that it clearly shows that the parties have not dealt with the properties as if the properties belonged to one Thavazhi. However, the learned District Munsif found that the partition under Exhibit A-1, herein which was Exhibit A-3 in that suit was invalid and incompetent as he held that there was no such tarwad as alleged and Raman Pillai was not a Karanavan of that tarwad. Only in O.S. No. 339 of 1954 on the file of the District Munsif's Court, Padmanabhapuram, out of these three litigations, namely, O.S. No. 293 of 1120 M.E., O.S. No. 339 of 1954, and O.S. No. 452 of 1960 on the file of the District Munsif's Court, Padmanabhapuram, the validity of the sale under Exhibit A-2 executed by Raman Pillai in favour of Daniel Nadar was specifically considered and it has been held that it was void on the ground that Raman Pillai and defendants 1 and 2 were members of a sub-tarwad and that the alienation made by Raman Pillai without the written consent of defendants 1 and 2 was invalid against the second defendant herein and he got 52 cents in the partition under Exhibit 'B' in that suit and that it took effect and that therefore he is entitled to redeem 52 cents as prayed for in that suit. The question for consideration therefore is whether the decision in the appeal

which arose out of that suit O.S. No. 339 of 1954, Exhibit B-17, regarding the validity of the sale under Exhibit A-2 in favour of Daniel Nadar would constitute *res judicata.*

11. Exhibit A-3 is the judgment dated 21st October, 1952 in O.S. No. 293 of 1120 M.E. The finding of the learned District Munsif in that suit regarding the status of Raman Pillai and defendants 1 and 2 was that the plea that Raman Pillai was not the karnavan of defendants 1 and 2 should prevail. That finding has been upheld in A.S. No. 142 of 1953 in the judgment, Exhibit A-5, dated 10th October, 1957, on the file of the Subordinate Judge who has observed that merely because the C Schedule properties in the partition deed had been allotted to defendants 1 and 2 and Raman Pillai, it cannot be stated that they form one thavazhi of which Raman Pillai who had been examined as D.W. 4, was the karnavan, that a thavazhi was out of the question in the absence of a female member, and that from the documents it can be seen that the parties had not dealt with the properties as if they belonged to one thavazhi. Thus both in O.S. No. 293 of 1120 M.E. on the file of the trial Court as well as in A.S. No. 142 of 1953 on the file of the Sub-Court, Nagercoil, it has been found that Raman Pillai and defendants 1 and 2 were not members of a thavazhi and that Raman Pillai was not the karnavan. But in A.S. No. 132 of 1957 (Exhibit B-17) which arose out of O.S. No. 339 of 1954 on the file of the District Munsif Court, Padmanabhapuram, referred to above it has been held, as already stated, that defendants 1 and 2 and Raman Pillai continued to be undivided until the partition effected in the year 1121 M.E., under the document marked as Exhibit B in that suit and that the sale by Raman Pillai in favour of Daniel Nadar without the consent of defendants 1 and 2 was invalid against the 2nd defendant. In the subsequent decision in O.S. No. 452 of 1960 on the file of the District Munsif's Court, Padmanabhapuram (Exhibit A-17) to which Daniel Nadar and defendants 1 and 2 were parties as defendants 6, 2 and plaintiff respectively, it has been held, as has been held in O.S. No. 293 of 1120 M.E. and A.S. No. 142 of 1953 that defendants 1 and 2 and Raman Pillai were not members of a thavazhi. The question for consideration therefore is whether the decision in the latest suit O.S. No. 452 of 1960 regarding the status of defendants 1 and 2 and Raman Pillai does not constitute *res judicata.*

12. It is seen from the judgment in O.S. No. 293 of 1120 M.E., Exhibit A-3 that the allegation in that suit was that defendants 1 to 3 therein had trespassed into item No. 1 in that suit and that Nakshatram Abaranam, the first plaintiff in that suit filed O.S. No. 1827 of 1108 M.E. for eviction of defendants 1 to 3 and she recovered possession of her half share through Court on 27-2-1111 M.E. after depositing 200 panams towards improvements, that the first defendant contended that the decree and execution proceedings in O.S. No. 1827 of 1108 M.E. were vitiated by fraud and were not valid and that Nakshatram Abaranam, the first plaintiff in O.S. No. 293 of 1120 M.E. did not get possession in the execution proceedings, and the second defendant contended that he was a minor on the date of institution of O.S. No. 1827 of 1108 M.E. and was not represented by a guardian, that Raman Pillai was his karnavan and he had not been impleaded as a party and that the decree in that suit was not binding on his tarwad. The learned District Munsif has found in paragraph 23 of his judgment in O.S. No. 293 of 1120 M.E. that the decree in O.S. No. 1827 of 1108 M.E. sought to decide the dispute between the parties to the extent of its validity and was binding on the first defendant but not on the second defendant and that the 2nd defendant succeeds so far as his one-half in the entire suit survey number is concerned, since the decree in O.S. No. 1827 of 1108 M.E. was not binding on him as he had been impleaded as a major, while in fact he was only a minor. In this view, the learned District Munsif granted a preliminary decree declaring Dr. John Hilkiah's title to one-fourth share in the suit survey number and for partition and separate possession of the same

and he held that defendants 1 and 2 were entitled to a half share by virtue of the decree in O.S. No. 1872 of 1108 M.E.

13. Daniel Nadar, who was the 10th defendant in O.S. No. 293 of 1120 M.E. filed I.A. No. 324 of 1961 in the District Munsif's Court, Padmanabhapuram, for setting aside the order dated 25th October, 1960 in I.A. No. 1634 of 1960 by which defendants 23 to 25 in that suit were granted a supplemental preliminary decree. That application was dismissed by the Order Exhibit B-5 dated 7th November, 1961 where the learned District Munsif has observed that the right of defendants 1 and 2 for a half share of the schedule properties has been declared by the preliminary decree dated 21st October, 1952 in O.S. No. 293 of 1120 M.E. and that paragraph 24 of the judgment in that suit will indicate the same and only the first defendant and the second defendant had appealed against the decree and Dr. John Hilkiah's right to a half share in the suit property has been established in the appeal filed against the preliminary decree granted in O.S. No. 293 of 1120 M.E. The learned District Munsif has rightly found in his order Exhibit B-5 that defendants 1 and 2 were declared to be entitled to a half share in the suit survey number and that in the appeal (A.S. No. 142 of 1953) Dr. John Hilkiah who had been held by the trial Court in O.S. No. 293 of 1120 M.E. to be entitled to only one-fourth share, had been held to be entitled to a half share. The said order dated 11th July, 1961 had been confirmed on appeal by the learned Subordinate Judge, Padmanabhapuram in C.M.A. No. 45 of 1961 on 14th September, 1961. Exhibit B-6 is the certified copy of the decree in that Civil Miscellaneous Appeal. The final decree Exhibit B-8 dated 23rd November, 1961 in O.S. No. 293 of 1120 M.E. passed on the application of Dr. John Hilkiah for allotment of his share, has been passed only on the basis that Dr. John Hilkiah was entitled to a half share and defendants 1 and 2 were entitled to the remaining half share in S. No. 3020-A. Defendants 1 and 2 had made some alienations in the meanwhile. The final decree has been passed allotting plot Nos. 1 to 3 to Dr. John Hilkiah, plot No. 4 to defendants 24 and 25, plot No. 5 to defendant 23, plot No. 6 to defendants 14 and 15, plot No. 17 to defendants 16 and 17 and plot Nos. 8 and 10 to defendants 1 and 2. Exhibit A-7 is the Commissioner's plan in that suit according to which the plots were allotted to the parties as mentioned above. It is seen from Exhibit B-8 that plot No. 9 is part of plot No. 1 in the Commissioner's plan Exhibit A-7. Therefore, it is not possible to agree with the observation of the learned District Munsif in paragraph 16 of his judgment in the present suit that the shares of defendants 1 and 2 have been only indicated but not clearly declared.

14. The last point that arises for consideration is, whether the present suit for partition of 2 acres claimed by the appellants is barred by *res judicata* by the decision in O.S. No. 293 of 1120 M.E.

15. Raman Pillai has been held in O.S. No. 293 of 1120 M.E., A.S. No 142 of 1953 which arose from the decree in that suit and O.S. No. 452 of 1960 on the file of the trial Court to be not the karnavan of defendants 1 and 2 on the ground that in the partition deed Exhibit A-1 dated 13-11-1097 M.E., the then minor defendants 1 and 2 were represented by their father which would not have been the case if these defendants and Raman Pillai were undivided members of a thavazhi and Raman Pillai would have acted as their guardian if he was the karnavan of any such tarwad. In O.S. No. 293 of 1120 M.E., a mortgage deed dated 1710 M.E. was produced as Exhibit 20. That had been executed by Raman Pillai and others in favour of one Narayana Pillai during the minority of defendants 1 and 2. There also the father of defendants 1 and 2 represented them as their guardian and not Raman Pillai, and the learned District Munsif has observed in paragraph 15 of his judgment in O.S. No. 293 of 1120 M.E. that if defendants 1 and 2 and Raman Pillai formed one thavazhi, the father had no place in the docu-

ment and therefore the plea that Raman Pillai was not the karnavan of defendants 1 and 2 should prevail. The learned Subordinate Judge has observed in paragraph 7 of his judgment in A.S. No. 142 of 1953, Exhibit A-5, that from the mere fact that C Schedule properties in Exhibit A-1 were allotted to the shares of Raman Pillai and defendants 1 and 2, it could not be stated that they formed one thavazhi of which Raman Pillai was the karnavan, that a thavazhi was out of question in the absence of a female member and that even in Exhibit 8 in that case, namely Exhibit A-1 herein, defendants 1 and 2 who were then minors were represented by their father and that on the other hand if those defendants and Raman Pillai formed one thavazhi, Raman Pillai would have acted as their guardian and not their father. For similar reason the learned District Munsif has found in paragraph 9 of this judgment in O.S. No. 452 of 1960, Exhibit A-17 that defendants 1 and 2 and Raman Pillai were not members of a thavazhi. But the judgment in A.S. No. 132 of 1957 Exhibit B-17, which arose out of the decree in O.S. No. 339 of 1954 on the file of the District Munsif's Court, Padmanabhapuram, it has been held that there was no partition prior to the date of Exhibit 'B' in that case between defendants 1 and 2 and Raman Pillai, that the 2nd defendant and the members of his tarwad continued to be joint until the date of Exhibit 'B' of the year 1120 M.E. and that the sale deed Exhibit 'I' in that case, Exhibit A-2 herein by Raman Pillai of the year 1117 M.E. executed without the written consent of defendants 1 and 2 was invalid.

16. Mr. S. Padmanabhan learned counsel for the appellant relied upon two decisions in support of his contention that the latest judgment Exhibit A-17 regarding the status of defendants 1 and 2 and Raman Pillai at the time of execution of the sale deed Exhibit A-2 namely that they were not members of a tarward of which Raman Pillai was the karnavan would prevail and constitute *res judicata*, and that the observation of the learned District Judge in paragraph 15 of his judgment now under appeal, namely that the decision of the superior Court, namely the sub-Court, Padmanabhapuram in Exhibit B-17 would prevail over the judgment Exhibit A-17 which is of an inferior Court, is incorrect.

17. The effect of earlier and later adjudications were considered is *Seshayya Garu* v. *Rajah of Bittapur*[1]. The learned Judges have observed in that decision at page 220 thus :

> "There has been a previous adjudication in 1895 between the same parties by a Court, which it is conceded, had jurisdiction, which expressly decided the issue as to the rate of rent. The adjudication is pleaded by the landlord as *res judicata*, and he claims that a finding in the present suit on the issue as to the rate of rent should be entered in accordance with the previous adjudication; but it so happens that there was a still earlier adjudication in 1893 on the same issue between the same parties by a competent Court in which a different finding was arrived at. This was not pleaded in the later suit. The tenants plead that there being two conflicting judgments neither of them could be pleaded as *res judicata* and the Court in the present suit was bound to try the issue and come a conclusion on the evidence which may be placed before it. We think that, on principle, in cases of judgments *inter partes*, the later adjudication should be taken as superseding the earlier. If for example the earlier finding had been pleaded in the suits which resulted in the determination of 1895 but the Court rightly or wrongly overruled the plea and decided the issue in a manner different from the previous adjudication, there can be no doubt that the later adjudication is the one which is pleadable as *res judicata*. So likewise, if the tenants had pleaded the earlier adjudication but had failed to prove it and the Court in the later suit had arrived at a determination on the evidence in the case, the later would be the adjudication which would be pleadable as bar. The fact that the tenants did

1. (1916) 31 M.L.J. 219 at 220.

not choose to plead the adjudication of 1893 in bar of the trial afresh of the same issue as to rates of rent cannot make any difference as regards the operation of that determination as *res judicata* any more than their failure to let in a piece of evidence which might have resulted in a determination other than the actual finding. It must be remembered that the plea of *res judicata*, is one which does not affect the jurisdiction of the Court but is a plea in bar of a trial of a suit or an issue as the case may be which a party is at liberty to waive. It is quite easy to conceive of cases in which the parties to a former adjudication dissatisfied with it bring the matter again before the Courts without raising the plea of *res judicata*. Suppose in this case the tenants deliberately omitted to plead the adjudication of 1893 with a view, if possible of getting the Court to hold that the rate of rent payable by them was less than what was found to be the rate in the previous suits. If after having invited a decision on the merits would they now be at liberty to go behind the last adjudication and ask for a retrial of the issue, because the fresh finding was even worse than the first against them. We certainly think not; and on principle it is impossible to make a distinction between a case where the plea is omitted to be taken by accident or mistake and where it is omitted to be taken by design. The only test therefore is whether as a matter of fact there has been an express decision on a material issue whatever be the materials on which that adjudication was arrived at."

There has been an express decision in the latest Judgment Exhibit A-17 on the question of the status of defendants 1 and 2 and Raman Pillai and it has been held there that they were not members of a tarwad at the time of the partition under Exhibit A-1 which was Exhibit A-3 in that suit.

18. Another decision in which this question was considered is the one in *Damodar Rao* v. *Bhima Rao and another*[1]. In that case the earlier decision was of the High Court, and the later decision was of a District Munsif's Court which became final. Tukol, J., has observed in his judgment in terms:

> "So the position at the date of the present suit was that there were two decrees recording conflicting decisions on the question of status of a Hindu family. In such a situation where both the decrees satisfy the requirements of section 11 of the Civil Procedure Code, it is the later decree that prevails over the earlier for the purpose of decreeing the question of *res judicata*. The fact that the earlier decision was of the High Court, is not material since the principle of *res judicata* is not dependent upon the status or the grade of the two Courts which have rendered the decisions but upon the finality of the decision and its binding character on the parties concerned."

Therefore though the subsequent decision Exhibit B-17 was of a superior Court, namely of the Sub-Court and the latest decision was of the District Munsif's Court, the latest decision in which the question regarding the status of defendants 1 and 2 and Raman Pillai was expressly considered would prevail and constitute *res judicata*. Therefore I agree with Mr. Padmanabhan, and hold that on the date of the sale under Exhibit A-2 by Raman Pillai in favour of Daniel Nadar, there was no thavazhi of defendants 1 and 2 and Raman Pillai and that Raman Pillai was not the karnavan of the thavazhi and he was therefore entitled to deal with his share in the properties without reference to the defendants 1 and 2.

19. As already stated amongst three sets of decisions, namely O.S. No. 293 of 1120 M.E., A.S. No. 142 of 1953 and S.A. No. 204 of 1959 forming one set; A.S. No. 132 of 1957 on the file of the Sub-Court, Padmanabhapuram, which arose out of O.S. No. 339 of 1954 on the file of the District Munsif's Court, Padmanabhapuram, forming another set and O.S. No. 452 of 1960 on the file of the District Munsif's Court Padmanabhapuram, forming the third set, the validity and binding nature of the sale by Raman Pillai in favour of Daniel Nadar came up specifically for consideration only in

1. A.I.R. 1965 Mys. 290.

A.S. No. 132 of 1957 and the learned Subordinate Judge has held in his judgment Exhibit B-17 that the sale by Raman Pillai in favour of Daniel Nadar was without the written consent of defendants 1 and 2 and was invalid against the second defendant herein the plaintiff in that suit. The first defendant was in similar position and that finding would equally apply even with reference to him. This decision has become final and would be binding on the parties, and the finding in the latest decision in O.S. No. 452 of 1960 regarding the status of defendants 1 and 2 and Raman Pillai at the time of execution of that sale deed would not have the effect of validating the sale deed which has been held in the said A.S. No. 132 of 1957 to be invalid though that findings may be erroneous having regard to the latest finding regarding the status of those persons at the time of execution of the partition deed Exhibit A-1 even earlier in 1097 M.E. As already stated the clear finding of the learned District Munsif in paragraph 23 of his judgment in O.S. No. 293 of 1120 M.E., is that the decree in O.S. No. 1827 of 1108 M.E. is binding on the first defendant, but not on the second defendant, that the final decree in that suit ought to decide the dispute between the parties to the extent of its validity and that therefore Dr. John Hilkiah was entitled to only one-fourth share and defendants 1 and 2 were entitled to a half share in the properties. This has been made clear in paragraph 24 of the judgment as observed by the learned District Munsif in his order Exhibit B-5 dismissing I.A. No. 324 of 1961 filed by Daniel Nadar for setting aside the order dated 25th October, 1960 in which defendants 23 to 25 in O.S. No. 293 of 1120 M.E. were granted a supplementary preliminary decree in I.A. No. 1634 of 1960. The learned District Munsif has observed that only defendants 1 and 2 had appealed against the decree and that the right of Dr. John Hilkiah to a half share in the suit properties has been established in the appeal in A.S. No. 142 of 1953. The decree in that appeal, appears from Exhibit B-8, the final decree dated 23rd November, 1961 passed in O.S. No. 293 of 1120 M.E. to have been confirmed by this Court in Second Appeal No. 204 of 1959. The order Exhibit B-5 dismissing Daniel Nadar's application in I.A. No. 324 of 1961 has been confirmed by the learned Subordinate Judge, Padmanabhapuram in C.M.A. No. 45 of 1961 as can be seen from the decree Exhibit B-6 dated 14th September, 1961. It is true, as can be seen from Exhibit A-9 that in I.A. No. 952-A of 1953 filed by Daniel Nadar for passing a second preliminary decree for partition of his share of 2 acres in item No. 1 in O.S. No. 293 of 1120 M.E., the learned District Munsif has directed Daniel Nadar to take separate proceedings against the remaining defendants in respect of his claim for partition of his two acres. It was contended by Mr. S. Padmanabhan, the learned counsel for the appellants that this would entitle Daniel Nadar to file the present suit for partition of his share in S. No. 3020-A and that the preliminary decree and final decree passed in the suit would not bar his right.

20. In this connection Mr. S. Padmanabhan relied upon some decisions. The first of these decisions is of Curgenven, J., in *Lakshminarasimhan* v. *Lakshmi Pathi*[1]. In that case, defendant 2 had obtained a mortgage decree against defendant 1 and in the Court sale defendant 3, it was said, benami for defendant 2, bought defendant 1's property. There was an arrangement between the three defendants and the plaintiff, according to which defendant 1 executed a mortgage in favour of the plaintiff for Rs. 400 on the property which had been sold by the Court, and defendant 3, the Court-auction-purchaser, undertook to get the Court-sale set aside. But defendant 3 failed to do so, and so the mortgage bond passed no interest to the plaintiff. The plaintiff therefore filed O.S. No. 368 of 1920 for recovery of the mortgage amount, if necessary by the sale of the mortgaged property. The District Munsif who tried the suit granted a decree merely declaring the plaintiff's mortgage right and gave him liberty to enforce his right in a separate suit. The

1. A.I.R. 1931 Mad. 830.

plaintiff accordingly filed O.S. No. 88 of 1925 to enforce his right for recovery of the mortgage amount. The District Munsif found in that suit that the subsequent suit was barred both by *res judicata* and under Order 2, rule 2, Civil Procedure Code. But on appeal the Subordinate Judge found that the two suits were based upon different causes of action and he remanded the suit. Curgenven, J., has extracted in his judgment the following passage in the judgment of Garth, J. in *Ramachandra Bahadur* v. *Reazuddin*.[1] They considered rightly or wrongly that they were not in a position to try the main question in the case and it is clear that the question, which was advisedly left undecided in the former suit, cannot be said to have been heard and finally decided within the meaning of section 13 (now section 11) of the Code and they observed :

> "So in the present case it may be that the District Munsif ought to have forthwith granted a mortgage decree. But rightly or wrongly, he considered himself precluded from the manner in which the suit was brought from doing this. I am unable to see that he thereby decreed any such matter as would make it *res judicata* between the parties."

This decision will not apply to the facts of the present case, for the liberty to enforce his right to recover the mortgage amount had been granted to the plaintiff in O.S. No. 368 of 1920, who subsequently filed O.S. No. 88 of 1925 for the purpose for which liberty had been granted to him in the very same suit namely O.S. No. 368 of 1920 and not in any subsequent proceeding whereas in the present case, as already seen, the preliminary decree in O.S. No. 293 of 1120 M.E. declared the right of defendants 1 and 2 to a half share in the property and of Dr. John Hilkiah to one-fourth share in the property and on appeal Dr. John Hilkiah has been declared to be entitled to a half share and the right of defendants 1 and 2 to a half share has not been affected in any manner whatsoever. Subsequent to the date of the order, namely 8th October, 1958, in which liberty was given to Daniel Nadar for taking separate proceedings in respect of his claim in I.A. No. 952-A of 1958, Daniel Nadar filed an application in I.A. No. 324 of 1961 for setting aside the order in which a supplementary preliminary decree was granted to defendants 23 to 25 in I.A. No. 1634 of 1960. That application was dismissed on 11th July, 1961 under Exhibit B-5, and this order has been confirmed on appeal in C.M.A. No. 45 of 1961 as mentioned above, and the final decree Exhibit B-8 has been passed on 23rd November, 1961 on the basis that Dr. John Hilkiah was entitled to one-half share and defendants 1 and 2 and others who claimed certain shares under one or the other of these defendants were entitled to the remaining half share.

21. The next decision relied on by Mr. S. Padmanabhan, learned counsel for the appellant is the decision in *Ebratten-nessa Bibi* v. *Saratchandra*[1]. In that case the decision of the trial Court was based on findings on two issues regarding tenancy and title. The suit was dismissed by the trial Court. The appellate Court disposed of the appeal on its finding on the question of tenancy, agreeing with the trial Court on that issue, and declined to go into the question of title and expressly left it open while dismissing the appeal. It has been held by the High Court that the finding of the trial Court on the issue left untouched and undecided by the appellate Court did not operate as *res judicata* in the subsequent suit. This decision also will not apply to the facts of the present case, for as already stated, liberty has not been given to Daniel Nadar to file a separate suit for partition of his share in the preliminary decree in O.S. No. 293 of 1120 M.E. itself.

22. The next decision relied upon by Mr. S. Padmanabhan, learned counsel for the appellants is of a Bench of this Court in *Bapanna* v. *Jaggiah*[2]. There it is observed :

1. (1884) I.L.R. 10 Cal. 856.

1. A.I.R. 1934 Cal. 14.
2. A.I.R. 1939 Mad. 811 at 824.

"Explanation 4 imports a fiction into section 11, Civil Procedure Code. Having provided that a matter which might and ought to have been made a ground of defence or attack in a former suit, it introduced a fiction that it shall not only be deemed to have been raised but also to have been directly and substantially involved in that suit. This would not have been however, enough for the purpose of section 11, Civil Procedure Code, until the matter was presumed to have been decided. It therefore imported a further fiction that it should also be deemed to have been heard and finally decided. In *view of an* express *order by the Court that the matter* would be left open, it is impossible to permit *any such fiction to be* introduced in this case."

This decision will also not apply to the facts of the present case where liberty had not been given in the preliminary decree itself.

23. The next decision relied upon by Mr. S. Padmanabhan is of Viswanatha Sastri, J., in *Gopipalayam Durga* v. *Kesavaswami Iyer*[1], where the learned Judge has observed :

"It is quite true that a decision would be *res judicata* even if it is not specific and express *provided it is necessarily* implied *in the decree. For instance*, a decree *which necessarily involves a finding* on an issue in the affirmative or negative, even though no specific finding was recorded on *it would be* res judicata *in a subsequent suit.* This Rule, however, can have no application, where, as here, the Court in the former suit has expressly left undecided the issues that arose for decision in the later suit. As observed by the Judicial Committee, it would be a contradiction in terms to say that the Court had finally decided matters which it expressly left untouched and undecided."

This decision would not help the appellants having regard to the fact that the facts of the present case are different. On the other hand, it would help the contesting respondents for the decree in O.S. No. 293 of 1120 M.E. granting a half share to defendants 1 and 2 and one-fourth share to Dr. John Hilkiah which was modified on appeal only so far as Dr. John Hilkiah's share is concerned wherein it has been held that he was entitled to a half share, necessarily involved an adverse finding on the question of Daniel Nadar's right to partition and separate possession of 2 acres of land in Survey No. 3020-A.

24. The last decision relied upon by Mr. S. Padmanabhan is of Gokulakrishnan, J., in *Subba Reddiah* v. *Seetharaman*[1], where 'T' claiming to be A's wife, brought a suit for injunction restraining the defendants from interfering with her possession of the property and the defendants claimed the property as the legitimate children of *A* on the basis of a custom for the validity of the marriage of their mother '*P*' with '*A*' and the High Court's decision granting an injunction subject to the defendant's right to establish the custom in a separate suit, cannot operate as *res judicata* as it is not final and therefore neither section 11 nor Explanation IV to section 11 would bar the subsequent suit by the defendants to establish their legitimacy and recover possession of the property. Liberty has been given in that case in the same decision unlike in the present case where as already stated, the rights of defendants 1 and 2 to a half share and Dr. John Hilkiah, to the other half share had been determined in the same suit in the presence of Daniel Nadar thereby impliedly denying the right to partition and separate possession of 2 acres in S. No. 3020-A. This denial of his right has been admitted in the Court in the present suit.

25. Daniel Nadar the 10th defendant in O.S. No. 293 of 1125 M.E., was in the nature of a plaintiff in that suit for partition where he had specifically prayed for partition of 2 acres out of item 1 in that suit which he claimed to have purchased from Raman Pillai. Therefore, Order 2, rule 2 of the Code of

1. (1949) 2 M.L.J. 153 ; (1949) M.W.N. 466.

1. (1972) 1 M.L.J. 497; A.I.R. 1972 Mad. 421.

Civil Procedure, would apply even though he was only a defendant. Order 2, rule 2, Civil Procedure Code, lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that where he omits to sue in respect of, or intentionally relinquishes any portion of the claim he shall not afterwards sue in respect of the portion omitted or relinquished. Section 11 of the Code of Civil Procedure, lays down that no Court shall try any suit or issue in which the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties or between parties under whom they claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. *Explanation* 4 to section 11 lays down:

> "Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Therefore, though the question of the validity and binding nature of the sale by Raman Pillai in favour of Daniel Nadar and Daniel Nadar's right to partition and separate possession of 2 acres in survey No. 3020-A had not been specifically considered in O.S. No. 293 of 1120 M.E., it is a matter which ought to have been considered in the former suit and should be deemed to be a matter which was directly and substantially in issue in that suit. Daniel Nadar had not been declared to be entitled to partition and separate possession of 2 acres in survey No. 3020-A in the former suit either in the preliminary decree or in the final decree Exhibit B-8. The order Exhibit A-9 in I.A. No. 952 (a) of 1958 will not amount to any direction in the preliminary decree itself for the question of Daniel Nadar's claim for partition and separate possession of 2 acres being left open for consideration in a separate suit. In *Venkatasubbayya v. Virayya*[1], in a previous suit for partition of joint family property, the Court held that a certain item was joint family property, but by mistake or oversight no direction for division of that property was given in the preliminary decree or final decree for partition. The plaintiff's application for review or amendment of the decree was rejected on the ground of non-payment of Court fee and therefore he brought a second suit for partition of that item of property. It has been held that the second suit was barred by *res judicata*. This decision would apply to the facts of the present case. As already stated, in the presence of Daniel Nadar, the right of defendants 1 and 2 to a half share and of Dr. John Hilkiah to the other half share has been declared thereby impliedly negativing the right of Daniel Nadar to partition and separate possession of 2 acres in Survey No. 3020-A. Therefore, I agree with the learned counsel for the contesting respondents and hold that the decision in O.S. No. 293 of 1120 M.E. as modified in A.S. No. 142 of 1953 and confirmed by S.A. No. 204 of 1950, is valid and binding on Daniel Nadar and constitutes *res judicata*, and he is not entitled to file the present suit for partition and separate possession of 2 acres in S. No. 3020-A, though defendants 1 and 2 and Raman Pillai were not members of a thavazhee at the time of the sale by Raman Pillai in favour of Daniel Nadar under Exhibit A-2 and Raman Pillai had the right to deal with his share and also because the decision in A.S. No. 132 of 1957, Exhibit B-17, which arose out of the decision in O.S. No. 339 of 1954, where it has been held that the sale by Raman Pillai in favour of Daniel Nadar under Exhibit A-1 which was Exhibit 'I' in that suit, is not valid and binding on the second defendant who was in the same position as the first defendant on the date of the sale constitutes *res judicata*. The second appeal therefore fails and is dismissed with costs of the contesting respondents. No leave.

S.J. ——— *Appeal dismissed.*

1. 1956 An.W.R. 1082: I.L.R. (1956) A.P. 1076: A.I.R. 1957 A.P. 981.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M. M. Ismail, J.*

Sudarsanam alias Ramakrishna Naidu .. *Appellant**

v.

The Tiruvannamalai Municipal Council, Tiruvannamalai, represented by its Commissioner .. *Respondent.*

Madras District Municipalities Act (V of 1920), Schedule IV, rule 19 (1), (2), (3) and (4)—Levy of profession tax—Return of income submitted by assessee—No proper enquiry by executive authority regarding income submitted in the return—No opportunity given to substantiate the statement contained in the return—Levy of profession tax on arbitrary basis of income illegal.

Rule 19 (1) in Schedule IV of the Madras District Municipalities Act, enables a person to submit a return and rule 19 (3) enables the executive authority of the Municipality to deal with the matter. It contemplates two contingencies. The first contingency contemplated is the case where no return is made as required under sub-rule (1) and the second contingency contemplated is the case where even if such a return has been made, the executive authority is not satisfied with the correctness or completeness of the return. If either of the two contingencies arises, then rule 19 (3) empowers the executive authority to assign to the person concerned the class in the scale appropriate to the half-yearly income of such person as estimated by him. Rule 19 (4) indicates the factors that may be taken into account by the executive authority when he estimates the income under rule 19 (3). If the executive authority was not satisfied about the correctness or completeness of the return, he had the right to estimate the income, but that estimate cannot be arbitrary. As a matter of fact, before rejecting the return as incorrect or incomplete, the executive authority should have given an opportunity to the appellant to substantiate the return made by him. Only when the appellant failed to substantiate the correctness or completeness of the return and thereby the executive authority comes to the conclusion that the return is either incorrect or incomplete, his right to estimate the income under rule 19 (3) arises. Even while so estimating, he will have to take into account all the relevant circumstances some of which are mentioned in rule 19 (4). When the executive authority of the Municipality is estimating the income, certainly he will have to proceed with reference to some materials and he cannot merely by the spin of the coin, as it were, assign the class referred to in rule 19 (3) and cannot determine the income at his whims and fancies.

[*Para.* 3.]

In this particular case, there was a total failure on the part of the executive authority of the Municipality to conduct a proper enquiry as to the correctness and completeness of the return filed by the appellant and as a result of such enquiry, having come to the conclusion that the return was incomplete or incorrect, to estimate the income, having regard to the relevant circumstances including the factors mentioned in rule 19 (4).

[*Para.* 3.]

Held, that the income of the appellant was arbitrarily fixed by the executive Authority of the Municipality and therefore cannot be allowed to stand.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvannamalai in Appeal Suit No. 84 of 1973 preferred against the decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No. 792 of 1972.

M. N. Padmanabhan, for Appellant.

M.A. Adiseshan, G. Ramaswami and *K. Alagiriswamy*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 792 of 1972 on the file of the Court of the District Munsif, Tiruvannamalai, who lost before the Court's below is the appellant herein. He instituted the suit for a declaration that the levy of the profession tax by the Municipality was

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* S.A. No. 2194 of 1974. 29th March, 1977.

illegal and for an injunction against the Municipality from recovering the said tax, as his case was that for the half year ending 30th September, 1970 he was levied a profession tax of Rs. 4 only, but for the half year ending 31st March, 1971 and 30th September, 1971, he was levied a profession tax at Rs. 75/- assessing his income at Rs. 9,100 and this was done illegally, *mala fide* contrary to the provisions contained in the District Municipalities Act and the rules framed thereunder and also in violation of the principles of natural justice. Though the Municipality in its written statement denied the averments contained in the plaint that the plaintiff had sent a return as contemplated by the relevant rules for the half year ending 31st March, 1971 in the latter part of the written statement itself it was admitted that the plaintiff sent such a return and in evidence also the same was admitted. Notwithstanding this admission, namely, that the plaintiff had sent a return showing the half yearly income at Rs. 600 for the half year ending with 31st March, 1971 the claim of the executive authority of the Municipality was that he did not accept the return and he estimated the income of the plaintiff at Rs. 9,100 for that half year and levied the tax on that basis. The Municipality took up the plea that the plaintiff-appellant had not preferred any appeal to the higher authorities. Both the Courts below dismissed the suit and hence the present second appeal.

2. I am clearly of the opinion that the Courts below missed the point in controversy between the parties. It is rule 19 in Schedule IV of the Madras District Municipalities Act, that covers the controversy between the parties. Rule 19 reads as follows :

"19. (1) If, in the opinion of the (executive authority), profession tax is (or will be) due from any company or person for any half-year he shall serve a notice on such company or person either in that half-year or in the succeeding half-year requiring the company or person to furnish within such period, not being less than thirty days as may be specified in the notice, a return in the prescribed form showing the income on the basis of which, according to such company or person, it or he is liable to be assessed to profession tax for the half-year in question. Thereupon it shall be open to such company or person to submit a return showing the income derived by it or him during the half-year for which profession tax is claimed or for the corresponding half-year of the previous year and produce any evidence on which the company or person may rely in support of the return made.

Explanation : Where, in pursuance of section 97, a statement regarding the income of a company or the salary or income of an employed person has been furnished to the executive authority, nothing in this sub-rule shall be deemed to require that authority to serve a notice on such company or person.

(2) If a return is made as required under sub-rule (1) (or a statement regarding the income or salary is furnished under section 97) and the executive authority is satisfied that it is correct and complete he shall levy the profession tax from such company or person on the basis of (such return or statement).

Explanation :—In cases not falling under clause (*b*) of sub-rule (1) or under sub-rule (2) of rule 18, if the company or person produces the notice of demand of income-tax served on it or him under section 29 of the Indian Income-tax Act, 1922, for the year comprising the half-year in question, the executive authority shall be bound to take one-half of the income mentioned in such notice of demand as the income derived from the sources on which profession tax is leviable under this Act, as the income on the said sources for the purpose of levying profession tax.

(3) If no return is made as required under sub-rule (1) or if no statement is furnished under section 97 or if the executive authority is satisfied that any return so made or any statement so furnished is incorrect or incomplete, the executive authority shall assign to the company or person the class in the scale appropriate to the half-yearly

income of such company or person as estimated by him.

(4) The executive authority may, when classifying any company or person under sub-rule (3), do so on general consideration with reference to the nature and reputed value of the business transacted, the size and rental of residential and business premises the quantity and number of articles dealt with, the number of persons employed and the income-tax paid to Government.

(5) The executive authority shall not be entitled to call for the accounts of any company or person."

3. Thus, rule 19 (1) enables a person like the plaintiff to submit a return and rule 19 (3) enables the executive authority of the Municipality to deal with the matter. It contemplates two contingencies. The first contingency contemplated is the case where no return is made as required under sub-rule (1) and the second contingency contemplated is the case where even if such a return has been made, the executive authority is not satisfied with the correctness or completeness of the return. If either of the two contingencies arises, then rule 19 (3) empowers the executive authority to assign to the person concerned the class in the scale appropriate to the half-yearly income of such person as estimated by him. Rule 19 (4) indicates the factors that may be taken into account by the executive authority when he estimates the income under rule 19 (3). In this particular case, as I pointed out already, a return was sent by the appellant under rule 19 (1). Therefore, it is only the second contingency contemplated by rule 19 (3) that arises. If the executive authority was not satisfied about the correctness or completeness of the return, he had the right to estimate the income, but that estimate cannot be arbitrary. As a matter of fact, before rejecting the return as incorrect or incomplete, the executive authority should have given an opportunity to the appellant herein to substantiate the return made by him. Only when the appellant failed to substantiate the correctness or completeness of the return and thereby the executive authority comes to the conclusion that the return is either incorrect or incomplete, his right to estimate the income under rule 19 (3) arises. Even while so estimating, he will have to take into account all the relevant circumstances some of which are mentioned in rule 19 (4). One of the allegations of the appellant-plaintiff in the present case is that though he was not assessed to sales-tax, he was submitting his books to the Commercial Tax Authorities who had verified about the correctness of the said accounts. But in the written statement, the Municipality took the attitude that the Municipality was not bound to take into account the view entertained by the Commercial Tax Authorities or their view with reference to the correctness or completeness of the accounts of the appellant. In my view, that is a sweeping stand to take on behalf of the Municipality and when the executive authority of the Municipality is estimating the income, certainly he will have to proceed with reference to some materials and he cannot merely by the spin of the coin, as if it were, assign the class referred to in rule 19 (3) and cannot determine the income at his whims and fancies. In this particular case, there has been a total failure on the part of the executive authority of the Municipality to conduct a proper enquiry as to the correctness and completeness of the return filed by the appellant and as a result of such enquiry, having come to the conclusion that the return was incomplete or incorrect, to estimate the income, having regard to the relevant circumstances including the factors mentioned in rule 19 (4). As a matter of fact, D.W. 1 who was the Commissioner of the Municipality at the time when the suit was tried stated that he could not say on what basis the income of the appellant was estimated at Rs. 9,100 per half-year because the same was done by his predecessor. In view of this evidence no other conclusion is possible except to hold that the income of the appellant at Rs. 9,100 was arbitrarily fixed by the executive authority of the Municipality and therefore cannot be allowed to stand. The result is, the second appeal is allowed and the judgments and decrees of the Courts below are set aside and the suit instituted by

the appellant-plaintiff will stand decreed as prayed for. The parties will bear their respective costs throughout. Certainly it is open to the respondent-Municipality to proceed afresh in accordance with the law.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*G. Ramanujam, J.*

Velu Pandar and others.. *Appellants**

v.

Prakasam alias **Padmini**.. *Respondent.*

Tamil Nadu Agriculturists' Relief Act (IV of 1938), *sections* 19, 19 (*A*), 9(A); *Civil Procedure Code (V of* 1908), *section* 11 *—Suit for declaration of nullity of sale and redemption of mortgage as prayed for by Appellate Court—Application under Tamil Nadu Act IV of* 1938 *for benefits thereunder before the trial Court—Objection by defendants that application should have been filed before Appellate Court—Objection rejected and application allowed giving benefits under the Act IV of* 1938*—Validity—Decree obtained by mortgagor for redemption whether a decree for money within the meaning of Act IV of* 1938*—Scope of section* 19 (A) *and section* 9 (A)*—Section* 19 *amended by Act VIII of* 1973*—Mortgagor whose debt was payable on 24th February,* 1973 *can take advantage of amendment which came about later—Constructive* res judicata *or estoppel not applicable to the case.*

The respondent filed a suit for declaration that a sale-deed dated 5th May, 1948 executed by her father in favour of *P* was void and in the alternative for reconveyance of the property on payment of the sale price. She also claimed a decree for redemption on the basis that the said deed was a mortgage by conditional sale. The suit was dismissed by the trial Court, but on appeal to the High Court, the suit was decreed and the plaintiff was allowed to redeem the property and was directed to deposit into Court a sum of Rs, 8,500 towards principal and Rs. 7,963 towards interest from the date of mortgage till date of suit, as a condition of redemption. Thereafter, the plaintiff filed an application before the lower Court for amending the decree under section 19 of the Tamil Nadu Act IV of 1938 and this was opposed by the defendants. The objections were overruled and the application was allowed by the lower Court. In appeal therefrom, the defendants contended that the lower Court had no jurisdiction to amend the decree after the appellate decree passed by the High Court, that the decree was not one for payment of a debt under section 19, that the plaintiff ought to have moved the appellate Court when the appeal was pending for benefits under the Act IV of 1938 and having failed to do so she could not now approach the lower Court for relief and that the plaintiff was barred by *res judicata* inasmuch as she failed to approach the appellate Court for the said relief.

Held: Having regard to the object sought to be achieved by the Act, namely to give relief to indebted agriculturists, the construction of a provision in that Act could only be in the furtherance of that object. Though a decree for redemption obtained by a mortgagor might not in form amount to a decree for money in favour of a mortgagee, the effect of that decree was that unless the mortgagor paid the amount mentioned in the decree, he could not redeem the mortgaged properties from the mortgagee. Though there was no direction to the mortgagor as such to pay the mortgage money, in effect, it amounted to a direction to pay the mortgage money as a condition for redemption. If the mortgagor intended redeeming the properties, he could not do so without paying the amount referred to in the decree for redemption. A decree for redemption could also be construed for purposes of section 19 as a decree for payment of money. [*Para.* 5.]

Even if the redemption decree obtained by the respondent was not treated as a decree for money, the respondent could approach the Court for determination

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*A.A.O. No. 315 of 1976.

28th January, 1977.

of the mortgage money due by him to the mortgagee under section 19 (A) read with section 9 (A) and after getting a declaration of the actual amount due by him he could approach the Court for amendment of his redemption decree on such declaration, under the provisions of the Code of Civil Procedure. Thus, in any event, the Court below had the jurisdiction to amend the decree directly under section 19 treating the redemption decree as a decree for money or indirectly by declaring the amount of the mortgage money due by the respondent under section 19 (A) and then resorting to the amendment of the decree under the Code of Civil Procedure. [*Para.* 6.]

In view of section 19 (2), though the appellate decree in this case was passed subsequent to the date of publication of the amending Act (VIII of 1973), the same could be amended as the said sub-section (2) did not talk of any limitation or restriction on the right of the judgment-debtor to get relief by resorting to the said section. [*Para.* 7.]

To hold that the debtor could ask for relief only when the appeal was pending would be to deny him the relief under section 19 (2) which relief he could claim only after a decree for repayment of a debt had been passed. In this view, therefore, the respondent was not precluded from claiming the relief under section 19 (2) even though he had not claimed the relief in the High Court at the appellate stage. [*Para.* 7.]

It was only after the respondents right to redeem the mortgage was recognised she could apply for the scaling down of the mortgage debt. Thus, the respondent's right to apply for relief under the provisions of Tamil Nadu Act IV of 1938 as amended had arisen only after the appellate Court had upheld her claim for redemption by holding that the document dated 5th May, 1948 was a mortgage by conditional sale. Therefore, there was no question of invoking section 19 of the Act before this Court passed the appellate decree, as the respondent could claim a relief under the Act only after she got a declaration of her right to redeem the mortgage which she got only under the appellate decree. Thus, as there was no possibility for the respondent to seek the relief before the passing of the appellate decree, there was no question of estoppel or constructive *res judicata* as urged by the appellant. [*Para.* 8.]

Cases referred to :

Ramanathan Chettiar v. *Ramanathan Chettiar*, (1960) 1 M.L.J. 1 : 73 L.W. 1 : I.L.R. (1960) Mad. 97 : A.I.R. 1960 Mad. 207; *Narayanan* v. *Annamalai*, 1959 S.C.J. 788: (1959) 2 M.L.J. (S.C.) 55 : (1959) 2 An.W.R. (S.C.) 55: A.I.R. 1959 S.C. 275.

Appeal against the order of the Court of the Subordinate Judge, Tiruchirapalli dated 7th February, 1976 and made in I.A. No. 92 of 1975 in O.S. No. 250 of 1963.

R. Sundaralingam and *T. L. Ram Mohan*, for *R. Sundaralingam*, for Appellants.

M. S. Umapathy, for *Raj* and *Raj*, for Responde t.

The Court made the following

ORDER.—This appeal has been filed by the defendants in O.S. No. 250 of 1973 and the respondents in I. A. No. 92 of 1975 on the file of the Subordinate Judge, Tiruchirapalli. The respondent herein filed a suit for declaration that the sale deed dated 5th May, 1948 said to have been executed by her father in favour of one Pappammal is null and void and in the alternative for reconveyance of the property on payment of the sale price. She also claimed a decree for redemption on the basis that the said sale deed in favour of Pappammal was a mortgage by conditional sale. The Trial Court dismissed the suit with costs holding that the sale deed is true and valid, and that it is not a mortgage by conditional sale. On appeal in A.S. No. 428 of 1968, a Division Bench of this Court held that the said sale deed in favour of Pappammal was a mortgage by conditional sale and therefore passed a preliminary decree for redemption and permitted the plaintiff to depo it

into Court a sum of Rs. 8,500 towards principal and Rs. 7,963 towards interest accrued at the rate of 6% per annum from the date of mortgage till date of suit, as a condition for redemption.

2. Thereafter the plaintiff filed I.A. No. 92 of 1975 before the lower Court for amending the decree under section 19 of the Tamil Nadu Act IV of 1938 hereinafter referred to as the 1938 Act claiming benefits under that Act. The said application for amendment of the decree was opposed by the appellants mainly on the ground that the application for amendment of the decree should have been filed in this Court, which passed the appellate decree and not before the lower Court. The Court below rejected the said objection as to jurisdiction relying on the decision of the Full Bench of this Court in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[1], wherein it has been categorically ruled that the Court to amend a decree under section 19 would be the execution Court under section 37 of the Code of Civil Procedure and therefore an application to scale down a decree debt by amending the decree could be properly made to the Court of the first instance although the decree of that Court had been superseded by the decree of the appellate Court, and that the principle that the original decree in a case where an appeal has been filed is superseded and that therefore the appellate decree is the only decree between the parties for purpose of section 19 would have no application to a case where the appellate decree was itself capable of being amended under section 19. The lower Court amended the decree by scaling down the mortgage money due by the respondent with reference to the provisions of section 9 (A) of the 1938 Act as amended, to Rs. 947-68 as against the amount referred to in the decree of this Court is A.S. No. 428 of 1968. The order of the lower Court scaling down the mortgage debt and amending the decree accordingly has been challenged by the appellant.

1. (1960) 1 M.L.J. 1 : 73 L.W. 1 : I.L.R. (1960) Mad. 97 : A.I.R. 1960 Mad. 207.

3. In this appeal, apart from raising the question of jurisdiction of the Court below to amend the appellate decree passed by this Court under section 19, the appellant has also put forward two fresh grounds of attack. The ground relating to jurisdiction of the lower Court to amend the appellate decree passed by this Court is not tenable in view of the decision in *Ramanathan Chettiar* v. *Ramanathan Chettiar*[1], wherein, as pointed out by the Court below, the question whether the Court of the first instance can amend a decree passed by the appellate Court was specifically considered and decided. In that case it was pointed out that sections 19 and 20 of the Act have to be read together, section 20 being complementary to section 19, that the *Explanation* to section 20 would apply to section 19 as well as to the meaning to be given to the expression "Court which passed the decree", that the effect of the Explanation is to give a statutory definition of the expression "the Court which passed the decree" that an application to scale down a decree debt and to amend the decree could, therefore, be properly made to the Court of the first instance although the decree of that Court has been superseded and replaced by a decree of the appellate Court, that an application under section 19 (1) had therefore, to be made only to the Court of the first instance which passed the decree even though the appellate Court had either affirmed, modified or reversed the decree of that Court. Therefore, this question is no longer *res integra*.

4. The two fresh grounds of attack raised for the first time in this appeal by the appellants are: (1) That there is in fact no decree for payment of a debt to the appellant which could be scaled down under section 19, that the decree of this Court in A.S. No. 428 of 1968 merely enabled the respondent to pay a sum of Rs. 8,500 with interest for redemption of the usufructuary mortgage, and that there being no decree directing the respondent to pay the mortgage money, section 19 cannot be invoked for amendment of the same by way of scaling down. The second ground is that the respondent not having

1. (1960) 1 M.L.J. 1 : 73 L.W. 1 : I.L.R. (1960) Mad. 97 : A.I.R. 1960 Mad. 207.

sought the relief of scaling down under section 19 before the appellate Court passed the decree, the appellants will be estopped from claiming that benefit after the appellate decree had been passed.

5. The learned counsel for the appellant submits that section 19 can be invoked in respect of a decree debt, that is, a decree for payment of money, and not in respect of a decree for redemption which merely enables the mortgagor to redeem the mortgage on payment of the mortgage money. The above submission of the learned counsel is based on the assumption that the relief under section 19 can be claimed by a mortgagor only when the mortgagee files a suit for realising the mortgage money and not when the mortgagor files a suit for redemption and obtain a decree for redemption. On a due consideration of the matter I am not in a position to agree with the said submission of the learned counsel. Having regard to the object sought to be achieved by the Act, that, is to give relief to indebted agriculturists, the construction of a provision in that Act can only be in the furtherance of that object. If the construction suggested by the learned counsel that section 19 can apply only to decrees obtained by the mortgagees and not to a decree obtained by the mortgagor for redemption it will virtually deprive the indebted agriculturist from getting the benefits under that Act. Therefore such a consideration has to be avoided if possible. Though a decree for redemption obtained by a mortgagor may not in form amount to a decree for money in favour of a mortgagee, the effect of that decree is that unless the mortgagor pays the amount mentioned in the decree, he cannot redeem the mortgaged properties from the mortgagee. Though there is no direction to the mortgagor as such to pay the mortgage money, in effect, it amounts to a direction to pay the mortgage money as a condition for redemption. If the mortgagor intends redeeming the properties, he cannot do so without paying the amount referred to in the decree for redemption. I am, therefore, of the view that a decree for redemption can also be construed for purpose of section 19 as a decree for payment of money. I am not inclined to agree with the learned counsel for the appellant that the decree merely gives liberty to the mortgagor to pay the money as a condition precedent for redemption and that it is not a direction to the mortgagor to pay the money as it is always open to him not to pay the mortgagee money if he is not keen on redemption.

6. Even otherwise, in this case, there cannot be any doubt that the respondent as a debtor may apply to the Court for a declaration of the amount of debt due by him to the appellant under section 19(A) even if the redemption decree obtained by him is not treated as a decree for money and it cannot also be disputed that a mortgage debt will also come within the operation of section 19 (A). Therefore, even if the redemption decree obtained by the respondent is not treated as a decree for money, the respondent can approach the Court for determination of the mortgage money due by him to the mortgagee under section 19 (A) read with section 9 (A) and after getting a declaration of the actual amount due by him he can approach the Court for amendment of his redemption decree based on such declaration, under the provisions of the Code of Civil Procedure. Thus, in any event, the Court below has got jurisdiction to amend the decree directly under section 19 treating the redemption decree as a decree for money or indirectly by declaring the amount of the mortgage money due by the respondent under section 19 (A) and then resorting to the amendment of the decree under the Code of Civil Procedure. In this view the contention based on the nature of the redemption decree has to fail.

7. It is then contended by the learned counsel for the appellant that the respondent could have moved this Court for relief under section 19 (*a*) in the appeal A.S. No. 428 of 1968 and he not having availed of that opportunity is estopped from claiming the benefit of the provisions of the Act. According to the learned counsel even at the time when this Court passed the appellate decree the benefit under section 9 (A) was available to the appellant and he having not chosen to claim the relief before this Court, it is not no longer open to him to claim the

same. In this connection the learned counsel refers to the decision of the Full Bench in *Ramanathan Chettiar* v. *Ramanathan Chettiar*,[1] and points out that the Full Bench overruled a similar contention based on estoppel and *res judicata* only because of section 16 (2) of the amending Act XXIII of 1948, and that there being no similar provision in the amending Act VIII of 1973 the objection based on estoppel and *res judicata* has to be accepted. I do not see how either the principle of estoppel or *res judicata* can be invoked in this case. In the Full Bench case decree had been passed on 27th February, 1946 and an appeal was pending before the High Court on the date of coming into force of the Tamil Nadu amending Act XXIII of 1948, which amended substantially Madras Act IV of 1938. The appeal was dismissed by the High Court on 14th of September, 1951 long after the amending Act came into operation. Subsequently the judgment-debtor filed an application for amendment of the decree under section 19 in the Court of the first instance and for scaling down the decree debt on the basis of the benefits conferred by the amending Act. That application was opposed on the ground that the omission on the part of the debtor to apply for relief under the amending Act at the appellate stage before the appellate Court passed the decree would preclude him from applying at a later stage on the principle of *res judicata*. This contention was rejected by the Full Bench holding that if a provision of the statute enables the debtor to apply for relief in certain cases either before or after the decree, the rule of *res judicata* which was essentially a rule of procedure could not abrogate a right expressly given by the statute and that having regard to the generality of section 19 (2) which expressly refers to cases, where decrees have already been passed it would entitle a debtor to apply unless there is any limitation to such a right imposed by the provisions of the amending Act. The Full Bench purported to apply the decision of the Supreme Court in *Narayanan* v. *Annamalai*[1], wherein the Supreme Court has held in the circumstances similar to the present case that the debtor was entitled to apply for scaling down of the decree under section 19 as amended by Madras Act VIII of 1973. Section 19 reads as follows:

> "19 (1) Where before the publication of the Tamil Nadu Agriculturists Relief (Amendment) Act, 1972 in the Tamil Nadu Government Gazette a Court has passed a decree for repayment of a debt, it shall on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:
>
> Provided that all payments made or amounts recovered, whether before or after the publication, in respect of any such decree shall first be, applied in payment of all costs as are originally decreed to the creditor.
>
> (2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for repayment of a debt payable as at such publication."

Sub-section (1) of that section which applies to decrees passed before the publication of Act VIII of 1973 shall also apply to decrees passed in respect of debts payable at such publication as per sub-section (2). Sub-section (1) enables a debtor to apply for amendment of the decree passed before the publication of the Act by taking note of the provisions of the principal Act as amended. In this case the mortgage debt was admittedly payable on 24th February, 1973, the date of publication of the Act and the date of the appellate decree is 20th March, 1974 and the application for amendment of

1. (1960) 1 M.L.J. 1: 73 L.W. 1: I.L.R. (1960) Mad. 97: A.I.R. 1960 Mad. 207.

1. 1959 S.C.J. 788: (1959) 2 M.L.J. (S.C.) 55: (1959) 2 An.W.R. (S.C.) 55: A.I.R. 1959 S.C. 275.

the decree under section 19 (2) was filed on 24th December, 1974. In view of section 19 (2) though the appellate decree in this case was passed subsequent to the date of the publication of the amending Act, the same can be amended as the said sub-section (2) does not talk of any limitation or restriction on the right of the judgment-debtor to get relief by resorting to the said section. I do not therefore, see how the rule of constructive *res judicata* or estoppel can come into play in this case. As pointed out by the Supreme Court in *Narayanan* v. *Annamalai*[1], when the section in express terms entitles a debtor to claim a relief under the provisions of the Act when the Court has passed a decree after the publication of the Act for repayment of debt at such commencement that right cannot be taken away invoking the rule of constructive estoppel. To hold that a debtor can ask for relief only when the appeal was pending would be to deny him the relief under section 19 (2) which relief he can claim only after a decree for repayment of a debt has been passed. In this view, therefore, the respondent was not precluded from claiming the relief under section 19(2) even though he had not claimed the relief in this Court at the appellate stage.

8. Further, there is also one circumstance why constructive *res judicata* pleaded by the appellant cannot apply to this case. As already pointed out, the suit was one for a declaration that the sale deed dated 5th May, 1948, executed by the respondent's father was null and void and in the alternative for a declaration that the said sale deed was a mortgage by conditional sale and for redemption of the said mortgage. The main contest between the parties before the trial Court was whether the document dated 5th May, 1948 purporting to be a sale deed is a mortgage by conditional sale so that the respondent could redeem the same. The trial Court dismissed the suit holding that the document dated 5th May, 1948 is in reality a sale. It is only the appellate Court which held that the document dated 5th May, 1948 is a mortgage by conditional sale and enabled the respondent to redeem the mortgage. It is only after the respondent's right to redeem the mortgage is recognised she can apply for the scaling down of the mortgage debt. Thus, the respondent's right to apply for relief under the provisions of Tamil Nadu Act IV of 1938 as amended has arisen only after the appellate Court has upheld her claim for redemption by holding that the document dated 5th May, 1948 is a mortgage by conditional sale. Therefore there was no question of invoking section 19 of the Act before this Court passed the appellate decree, as the respondent can claim a relief under the Act only after he gets a declaration of his right to redeem the mortgage which he got only under the appellate decree. Thus, as there was no possibility for the respondent to seek the relief before the passing of the appellate decree, there is no question of estoppel or constructive *res judicata* as urged by the appellant.

9. The result is, the appeal fails and is dismissed with costs. Counsel's fee Rs. 100.

S. J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRS.

PRESENT.—*Varadarajan, J.*

Eni Ammal .. *Appellant**

v.

Soosai Michael Mudaliar .. *Respondent.*

Transfer of Property Act (IV of 1882), *section* 52—*Doctrine of* lis pendens *applicable to involuntary sales*—'A' *the owner of the property creating othi in favour of* 'B'—*Suit by* A's *wife* C *against* A *for maintenance with charge on property othied*—'B' *impleaded as party*—*Suit decreed*—*Execution of decree for arrears of maintenance*—*Othied property brought to sale*—*Purchase by* 'C' *subject to othi*—*Subsequent assignment of othi right by* B *to* C—'D' *a money decree-holder bringing the very same property to sale*—*Purchase by* D—*Delivery of possession effected*—*Right of* C *to redeem upheld.*

The doctrine of *lis pendens* applies to involuntary sales, and merely because a

1. 1959 S.C.J. 788: A.I.R. 1959 S.C. 275.

* S.A. No. 1881 of 1974. 17th March, 1977.

money-decree-holder was not *eo-nomine* a party to the decree in a maintenance suit creating a charge for maintenance on the disputed properties, he cannot claim that he is not bound by the decree. It is idle on the part of the money-decree-holder to contend that he was a *bona fide* purchaser for value without notice of the charge inasmuch as the charge had been prayed for even before the date of his suit. The Court sale in favour of the money-decree-holder cannot therefore prevail over the Court sale in favour of the purchaser in execution of the maintenance decree. The suit mortgage did not cease to exist and the plaintiff was entitled to redeem the same. [*Para.* 6.]

Cases referred to :

Sathaluru Seetharamanujacharyulu v. *Narra Venkatasubbamma*, (1930) 59 M.L.J. 485: I.L.R. 54 Mad. 132: A.I.R. 1930 Mad. 824 ; *Kedarnath* v. *Shenonarain*, (1970) 2 S.C.R. 204: A.I.R 1970 S.C. 1717; *Radhamadhub Holder* v. *Manohar*, (1887) 15 I.A. 97 : I.L.R. 15 Cal. 756; *Nilkant* v. *Suresh Chandra*, (1885) 12 I.A. 171 : I.L.R. 12 Cal. 414; *Motilal* v. *Karrabul-Din*, (1897) 24 I.A. 170 : I.L.R. 25 Cal. 179 : 1 Cal.W.N. 639.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Tirunelveli in Appeal Suit No. 57 of 1971 preferred against the Decree of the Court of the District Munsif (Addl.) of Ambasamudram in Original Suit No. 543 of 1968.

V. Ratnam, for Appellant.

C. K. Logadoss, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff, who succeeded in the trial Court but lost before the lower appellate Court, is the appellant. She filed the suit for redemption of an othi under Exhibit A-1 dated 6th May, 1955 executed by her husband Mayakrishna Konar in favour of one Mayilerumperumal. Mayakrishna executed a settlement deed dated 21st April, 1964 in favour of the appellant and subsequently cancelled it and deserted her. Thereafter he executed an othi deed, Exhibit A-1, dated 6th May, 1955 in favour of Mayilerumperumal. The appellant filed O.S. No. 168 of 1955 in the District Munsif's Court, Ambasamudram, against her husband Mayakrishna for partition and separate possession of a half share and also for her maintenance on a charge of certain properties, including the present suit properties, impleading the mortgagee Mayilerumperumal as the second defendant in the suit. She obtained a preliminary decree for partition and maintenance at Rs. 15 per mensem on a charge of the suit properties subject to the suit under Exhibit A-1 on 9th July, 1956 and she obtained the final decree, Exhibit A-7, on 5th August, 1957. Subsequently she filed E.P. No. 430 of 1966 and brought the suit properties to sale for arrears of maintenance due to her under the decree in O.S. No. 168 of 1955 and purchased the property herself subject to the othi under Exhibit A-1, under the sale certificate, Exhibit A-3 and obtained delivery of symbolical possession of the property under Exhibit A-4 in E.A. No. 39 of 1968. Mayilerumperumal, the mortgagee under Exhibit A-1, had assigned the othi right in favour of the appellant after the date of the maintenance decree, under Exhibit B-4, dated 17th March, 1958. Subsequent to the maintenance decree the respondent, in execution of a money decree obtained by him against the appellant's husband Mayakrishna in C.S. No. 92 of 1958 on the file of the Village Panchayat Court, North Veeravanallur, brought the properties to sale in E.P. No. 85 of 1960 and purchased them himself under the sale certificate, Exhibit B-1, dated 3rd June, 1960 and took delivery of possession of the properties on 10th August, 1960 under Exhibit B-2. The assignment under Exhibit B-4 and the Court sale under Exhibit B-1 pursuant to the decree in C.S. No. 85 of 1960 were affected by *lis pendens* and were not binding on the appellant. The Court sale under Exhibit B-1 cannot have any priority over the Court sale under Exhibit A-3, held under a charge decree. The appellant is, therefore, entitled to redemption of the usufructuary mortgage covered by Exhibit A-1.

2. The respondent's defence was that he is a *bona fide* purchaser for value without notice of the charge created by the decree in O.S. No. 168 of 1955 and that the sale in favour of the appellant is long after the Court sale in favour of the respondent and it cannot prevail against the latter. The othi under Exhibit A-1 had ceased to exist by reason of the purchase of the equity of redemption in the properties in the Court sale under Exhibit B-1 by the respondent. There is, therefore, no othi to be redeemed and the appellant is not entitled to redemption.

3. The trial Court found that the respondent is not a *bona fide* purchaser for value without notice of the charge on the ground that the assignment deed, Exhibit B 4, refers to the decree in O.S. No. 168 of 1955, and that the respondent, the purchaser in execution of a simple money decree, is bound by the charge, and the sale under Exhibit B-1 has not put an end to the othi. On these findings the trial Court decreed the suit with costs.

4. On appeal, the learned Subordinate Judge, Tirunelveli, found that the doctrine of *lis pendens* does not apply to involuntary sales, that the respondent is a *bona fide* purchaser for value without notice of the charge and the sale in his favour prevails over the sale in favour of the appellant and that the appellant has no right to redeem. He, therefore, allowed the appeal with costs and dismissed the suit.

5. It is not possible to agree with the learned Subordinate Judge that the doctrine of *lis pendens* under section 52 of the Transfer of Property Act, does not apply to involuntary sales. The learned District Munsif has relied upon the decisions in *Sathaluru Seetharamanujacharyulu* v. *Narra Venkatasubbamma and another*[1], and *Kedarnath* v. *Shenonarain*[2], in his judgment for coming to the conclusion that the doctrine of *lis pendens* has been made applicable even to involuntary sales. A Bench of this Court has held in the first of these decisions that a simple money decree creditor of a joint Hindu family has no priority over the charge granted by the decree in the absence of fraud or collusion and, therefore, the auction-purchaser, during the pendency of such maintenance suit, of an item of property over which a charge was claimed in the plaint and was granted by the decree who purchased in execution of the simple money decree binding on the family was not entitled to priority over another auction-purchaser of such property in proceedings taken to execute such maintenance decree. This observation would apply with full force to the facts of the present case where the appellant has purchased the properties in execution of a charge decree which she had obtained against her husband Mayakrishna Konar, through whom the respondent claims the property by right of purchase in Court-auction sale held in execution of a simple money decree which he had obtained against him in a civil suit instituted in a Village Panchayat Court. The Supreme Court has observed in *Kedarnath* v. *Shenonarain*[1], paragraph 17, thus:

> "Lastly it was contended that the sale was by Court-auction and the doctrine of *lis pendens* would not apply to such a sale. This point was considered in *Samarendra Nath Singh* v. *Krishna Kumar Nag*[2] by one of us (Shelat, J.), and it was observed as follows:—
>
> ....The purchaser *pendente lite* under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving his right, title and interest from or through him. This principle is well illustrated in *Radhamadhub Holder* v. *Manohar*[3] where the facts were almost similar to those in the instant case. It is true that section

1. (1930) 59 M.L.J. 485: I.L.R. 54 Mad. 132: A.I.R. 1930 Mad. 824.
2. (1970) 2 S.C.R. 204: A.I.R. 1970 S.C. 1717.

1. (1970) 2 S.C.R. 204: A.I.R. 1970 S.C. 1717.
2. (1967) 2 S.C.R. 18: (1968) 1 S.C.J. 68: A.I.R. 1967 S.C. 1440.
3. (1887) 15 Ind. App. 97: I.L.R. 15 Cal. 756.

52, strictly speaking, does not apply to involuntary alienations such as Court sales but it is well established that the principle of *lis pendens* applies to such alienations. See *Nilkant* v. *Suresh Chandra*[1] and *Motilal* v. *Karrabul-Din*[2]."

6. In view of these two decisions, it is not possible to agree with the learned Subordinate Judge that the principle of the doctrine of *lis pendens* does not apply to involuntary sales and that merely because the respondent was not *eo nomine* party to the decree in O.S. No. 168 of 1955 which created a charge for the maintenance of the appellant on the suit properties, he is not bound by that decree. The learned Subordinate Judge failed to take note of the fact that the appellant's husband, through whom alone the respondent is claiming the properties, was a party to that decree and the respondent would, therefore, be equally bound by that decree. It is idle on the part of the respondent to contend that he is a *bona fide* purchaser for value without notice of the charge for the charge had been prayed for even before the date of his suit. The Execution Petition No. 85 of 1960 was filed by the respondent clearly after the charge had been created over the properties by the decree in the maintenance suit. There is, therefore, no question of the sale under Exhibit B-1 in favour of the respondent prevailing over the sale in favour of the appellant under Exhibit A-3 and the suit mortgage ceasing to exist. The appellant is, therefore, entitled to redemption.

7. The second appeal is, therefore, allowed with costs throughout and the suit is decreed. No leave.

R.S. ——— *Appeal allowed.*

1. (1885) 12 Ind. App. 171 : I.L.R. 12 Cal. 414.
2. (1897) 24 Ind. App. 170 : I.L.R. 25 Cal. 179 : 1 Cal. W.N. 639.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

In Insolvency.

PRESENT :—*V. Sethuraman, J.*

Seth Khiaram Khushiram and others .. *Petitioners**.

v.

Kamadhenu Drinks represented by its partners 2 to 9 .. *Respondents.*

Presidency Towns Insolvency Act (III of 1909), section 9 (d) (ii), 9 (g)—Debtors, firm of partners—Branch at Madras—Partner of firm at Madras leaving for Erode—No other partner at Madras—Arrangement made for redirecting communications from Madras to Erode—Notice issued by creditors—Meeting between debtors and creditors on 7th and 8th March, 1976 for settlement of debts—Petition by some of the creditors to declare the debtors-firm and partners insolvent under section 9 (d) (ii) and 9 (g) of the Insolvency Act—No act of insolvency held to be committed.

Some of the creditors of the firm of Messrs Kamadhenu Drinks having its main office at Erode and a branch office at 10, Kasturi Ranga Iyengar Road, Alwarpet, Madras-18 filed two petitions under the Presidency Towns Insolvency Act alleging that the said firm and its partners had committed acts of insolvency coming within section 9 (d) (ii) and 9 (g) of the Presidency Towns Insolvency Act. The petitioners alleged that the debtors changed their place of business from Madras to Erode and had thereby committed an act of insolvency within section 9 (d) (ii). The petitioners also alleged that at the meetings held between the debtors and creditors on the 7th and 8th March, 1976 the debtors had stated that they could not make payment and had therefore suspended payment which was an act of insolvency within section 9 (g) of the Act.

Held: The notices that were despatched to 10, Kasturi Ranga Iyengar Road had actually been received at the Erode

*1. Petition Nos. 41 and 46 of 1976. 15th June, 1977.

address. This itself showed that arrangements had been made for the purpose of seeing that communications could be had with the partner and the firm. It also appeared from the evidence that No. 10, Kasthuri Ranga Iyengar Road was not completely closed and that a person was available to tell the parties as to where the respondent was. Therefore, it could not be said on the facts herein that the respondents had committed any act of insolvency as provided in section 9 (*d*) (*ii*) of the Presidency Towns Insolvency Act. [*Para.* 8.]

From the language of section 9 (*d*) (ii) itself, it was clear that an act of insolvency is committed only where a person departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. There could be no presumption on the facts herein that the partner's departure from Madras was with intent to defeat or delay the creditors because he had left a representative behind. In the context of the appropriate instructions having been left for the purpose of communications reaching him, it could not be said that the partner was making himself scarce with any intent to defeat or delay the creditors. The first respondent being a firm could only act through a human agency and in the present case it was only the second respondent who, according to the petitioners, was representing the firm at Madras. Therefore, whatever applied to him would equally apply to the first respondent. There was nothing to show that the branch was closed with a view to defeat or delay creditors. [*Para.* 9.]

The essence of an act of insolvency under section 9 (*g*) was that the debtor should give sufficient indication to show that he had suspended payment of all the debts. No particular form of expression was necessary. What was necessary was that the words should unmistakably leave the impression in the mind of the creditor that the debtor had actually suspended or was about to suspend payment of all his debts. The words used by the debtors should be reasonably construed. A creditor could not approach the Court with a petition for insolvency by merely misunderstanding what was stated by the debtor. [*Para.* 16.]

Taking the evidence let in on behalf of the petitioning creditors alone, it was clear that the meeting on the 7th was only a preliminary meeting with the two or three creditors by the two debtors and that a further meeting was to be held on 8th April, 1976. Therefore, as far as the meeting on 7th April, 1976 was concerned, there was no question of notice of suspension of payment coming within the scope of section 9 (*g*) of the Act. [*Para.* 17.]

From the fact that subsequently there were several meetings even after the filing of the insolvency petitions, it was clear that the respondents who participated in the meeting on 8th April, 1976 were only trying to see how best the affairs relating to the debts due by the first respondent-firm could be settled. No inference could be drawn on the facts herein that the respondents were declaring that they were suspending payments or words to that effect so as to come within the scope of section 9 (*g*) of the Act. What happened on 8th April, 1976 was only a discussion for the purpose of discharging the debts in a satisfactory manner, and not a declaration that there was any suspension of payment. It could not be said that any act of insolvency had been committed by the first respondent or by other respondents. The case under section 9 (*g*) had not also been made out. [*Paras.* 24 *and* 27.]

Cases referred to:—

M. Ratchanganadan v. *Messrs Kishindas Shamdass*, (1966) 2 M.L.J. 548 : 79 L.W. 617 : A.I.R. 1967 Mad. 279 ; *Ramaswami Chettiar* v. *Muthialuswami Chettiar*, A.I.R. 1928 Mad. 903 ; *Gangu Veera Brahman* v. *Gangu Jaganadha Acharyulu*, (1935) 69 M.L.J. 184 : 42 L.W. 427 : A.I.R. 1935 Mad. 589 (2) ; *Chanahalu Siva Reddi* v. *The Official Receiver*, (1936) 71 M.L.J. 730 : 44 L.W. 651 : A.I.R. 1937 Mad. 13.

The Court delivered the following

JUDGMENT.—These two insolvency petitions have been filed by two sets of

creditors for adjudicating the first respondent-firm and its alleged partners, respondents 2 to 9 as insolvents. The first respondent is known as Kamadhenu Drinks. The creditors in I.P. No. 41 of 1976 had advanced different amounts on hundies or promissory notes. The first respondent agreed to repay the amounts borrowed within a period of 90 days from the said date of the hundies. The said promissory notes or hundies were executed at No. 10, Kasturi Ranga Iyengar Road, Madras-18, by one V.P. Muthukumaraswamy Gounder who is admittedly a partner in the said firm. According to the petitioning creditors in I.P. No. 41 of 1976 the first of them went to No.10,Kasturi Ranga Iyengar Road,on 1st, 2nd and 4th March, 1976 and did not find the board of Kamadhenu Drinks previously found in the said premises. He was not able to contact anyone of the partners at the aforesaid premises and it is, therefore, stated in the petition that the debtors had departed from the usual place of business at No.10,Kasturi Ranga Iyengar Road and had thus committed an act of insolvency within the meaning of section 9 (*d*) (ii) of the Presidency Towns Insolvency Act. Notices were given to the debtors in March, 1976 and they were acknowledged by the debtors by their letter dated 20th March,1976, wherein it was stated that Kamadhenu Drinks was at No. 26, Agraharam Street, Erode. It is therefore, alleged that the debtors had changed their place of business from No. 10,Kasturi Ranga Iyengar Road, Alwarpet, Madras-18 to No. 26. Agraharam Sreet, Erode, and had thereby committed an act of insolvency described in section 9 (*d*) (ii) of the Presidency Towns Insolvency Act. It is further alleged in the petition that after the receipt of notices some of the debtors came over to Madras and stayed in Hotel Ashoka and called for a meeting of the creditors in a room in the said hotel on 7th April, 1976 and also on 8th April, 1976. On 7th April, 1976 two of the creditors *viz*., Seth Biharilal Prakashlal and Seth Motiram Newendram attended the meeting and on that day it was represented by two of the debtors *viz*., S.V. Balasubramaniam and V.K. Swaminathan respondents 5 and 6 respectively, that they would call for the other debtors also and have full discussions with the creditors on the next day. At the meeting on the next day, a number of other creditors were also present and at that meeting it is alleged that the debtors expressed their inability to pay the amounts due immediately and stated that everything was in a state of confusion due to the sudden death of a partner V.M. Kailasa Gounder, that the accounts had not been kept properly and that it was not possible to discharge the huge liability incurred, as no partner was coming forward to give his share of debts and to co-operate in the discharge of the debts. It is alleged also that they stated that they could not make payment and they would not be in a position to pay the amount in the near future and that thus they suspended the payment. It is further alleged that the debtors told them that they could do whatever they wanted to do. It is stated in the petition that the debtors had suspended payment and thus committed an act of insolvency described in section 9 (*g*) of the Act. The prayer is, therefore, that the debtors should be adjudged as insolvents and that consequential orders should be passed.

2. A common counter affidavit has been filed by respondents 1 and 3. They have denied the allegations that they had committed any act of insolvency contemplated either by section 9 (*d*) (ii) or by section 9 (*g*) of the Act. According to them, there were several discussions and ultimately a settlement was reached by which Multani Bankers, to which class the petitioning creditors belonged, would be paid certain amounts by sale of No. 10, Kasturi Ranga Iyengar Road, for which purpose a special power of attorney was executed in favour of Sri R. Krishnaswami, Advocate. It is also stated that they paid a sum of Rs. 2,00,000 and the petitioning creditors were estopped from prosecuting this petition and that their only remedy was to take suitable steps to enforce the arrangement dated 10th May, 1976 as a result of which the power of attorney mentioned above had been given and the property bearing Door No. 10, Kasturi Ranga Iyengar Road was to be sold. It is stated in the

counter-affidavit that assets of the first respondent firm exceeded 1.5 crores of rupees and that the assets were more than sufficient to discharge all the liabilities of the firm and that with a view to evade payment of court-fee, the petitioning creditors had chosen to file the petitions for insolvency as for adjudicating the respondents as insolvents as a short-cut for recovery, which was not permissible under the law.

3. The second respondent and the fourth respondent have filed counter affidavits which run more or less on the same lines as of the first and the third respondents. In the counter-affidavit filed by the fifth respondent it is stated that he was no longer a partner in the firm of Kamadhenu Drinks and that the acts of insolvency said to have been committed would not in any manner justify his adjudication. Respondent No. 6 and respondent No. 8 (for himself and on behalf of respondents 7 and 9) have filed counter-affidavits denying the allegations of their having committed any act of insolvency.

4. A reply affidavit has been filed in which the statements contained in the counter-affidavits have been controverted and it has been reiterated that the debtors said at the said meeting held on 8th April, 1976 that the creditors could do whatever they wanted to do.

In the course of the trial of the petitions on the side of the petitioning creditors, the first petitioning creditor has given evidence as P.W. 1. P.W. 2 by name Arjun was not a creditor of the first respondent-firm and was only representing his mother, who had advanced some monies, guaranteed by the respondents to a mill called 'Janardhana Mills Limited' in which the said Kailasa Gounder and others were interested. His evidence is relevant only for the purpose of finding out what happened on the 8th April, 1976, as he claimed to have been present at the said meeting. One Beharilal has given evidence as P.W. 3. He is a creditor of the firm ; but he is not one of the petitioning creditors. One Chandraban Ramchand has given evidence as P.W. 4. He is a finance-broker and according to him the finances were arranged through him and he was present at the meetings held on 7th April, 1976 and 8th April, 1976. On the side of the respondents, evidence has been given by respondents 2, 3, 5, 6, 7, and 8. The only respondents who did not give evidence were respondents 4 and 9.

5. I.P. No. 46 of 1976 was filed by four other creditors who have similarly advanced amounts to the first respondent-firm. They have also alleged that the acts of insolvency contemplated by section 9 (*d*) (ii) and section 9 (*g*) of the Presidency Towns Insolvency Act had been committed by the respondents. In the counter-affidavits filed in the said petition also, the respondents have taken the identical stand as in I.P. No. 41 of 1976. Apparently because the facts are identical, the petitioning creditors in I.P. No. 46 of 1976 did not let in separate evidence.

6. The evidence recorded in I.P. No. 41 of 1976 was by consent of parties, taken as common to both the petitions.

7. In the context of these facts, the points that require consideration in the petitions are :

1. Whether the respondents have committed acts of insolvency under section (9) (*d*) (ii) and section 9 (*g*) of the Presidency-Towns Insolvency Act ?

2. Whether the fifth respondent is not liable on the ground that he had retired from the first respondent firm ? and

3. Whether the acts of insolvency complained of are the joint acts so that all of them were liable to be adjudged as insolvents ?

8. There was one Kailasa Gounder, who was interested as a partner of Kamadhenu Drinks and also of several other limited companies like Janardhana Mills Limited, M.L.R. Drinks Limited, Amudam Enterprise Limited, etc. The partners of the first respondent firm belonged either to his family or to his brother's family or to the families of his relations. In fact, except the 9th respondent P. Chenniappan, the rest of the respondents fall into three categories. The second, third and fourth respondents are the nephews of Kailasa

Gounder, the sixth respondent is the son of Kailasa Gounder, fifth, seventh and eighth respondents are brothers who are relations of Kailasa Gounder. The firm of Kamadhenu Drinks had an office at 261, Agraharam Street, Erode, and a factory in a village near Erode. Some of the partners or their relations had purchased a property bearing No. 10, Kasturi Ranga Iyengar Road, and it is not in dispute that the second respondent was residing in the said premises wherefrom he was also borrowing monies for the first respondent-firm showing that place as the address of the said firm. On the death of Kailasa Gounder on 19th February, 1976 the second respondent left Madras for the purpose of attending the funeral ceremonies of his uncle. There is some difference in the version regarding the date of his return to Madras. In I.P. No. 41 of 1976, it is stated in paragraph 20 that some of the creditors named therein went to the business premises at No.10, Kasturi Ranga Iyengar Road, and were informed by V.P. Muthukumaraswamy the second respondent, that the debtors were indebted to the extent of more than Rs. 1½ crores and their total assets came to about Rs. 90 lakhs only. It is stated that the second respondent told them that they were in difficulties and they could not pay any amount unless the matter relating to Kailasa Gounder was settled. Thus, from that petition it is clear that the second respondent was in Madras on 26th February, 1976. However, on behalf of the respondents it is stated in the counter-affidavit as well as in the evidence that the second respondent, after he left Madras for attending the funeral ceremonies of Kailasa Gounder, did not return to Madras till sometime late in March. It appears that on or about 30th of March, 1976 there was a meeting of the Board of Directors of one of the Companies in which some of the respondents were interested and that on 31st March, 1976 the second respondent was taken into custody under the provisions of the Maintenance of Internal Security Act and taken to Coimbatore on the 1st of April, 1976. If the allegations in the petition are to be accepted with regard to their version, then the second respondent was available at premises No. 10, Kasturi Ranga Iyengar Road on 26th February, 1976. It is not allged that any act of insolvency was committed on 26th February, 1976 at the time of the meeting of some of the creditors with him. However, the allegations in the petition are that the first of the petitioning creditors visited the premises No. 10, Kasturi Ranga Iyengar Road, on the 1st, 2nd and 4th of March, 1976 and did not find the board and could not contact any of the respondents there. Though it is in evidence that some of the other respondents, whenever they came to Madras, stayed in the said premises, there is nothing to show that they were ordinarily residing at the said premises. From the fact that the first respondent-firm is carrying on business in Erode for several years and is having an office at Erode, it could be seen that the Madras Office was, if at all, only a branch, and from this branch the only transactions that were evidently transacted were borrowing by the second respondent on behalf of the firm apparently on a large scale. The said Kailasa Gounder, was a man of considerable resources and a well-known industrialist and businessman of Erode. On his death, which was sudden, problems arose and differences also erupted among the groups. It is clear that there were difference of opinion between his son and his nephews, respondents 2, 3 and 4. From the petition it is also clear that a committee of five persons consisting of Subbaroya Gounder, Muthuvellappa Gounder, Muthuswami, Sengottuv llappan and Lakshminarayana Gounder had taken interest in the settlement of the liabilities of Kailasa Gounder and had called for a list of persons to whom Kailasa Gounder owed any amount. It is, thus evident that on the death of Kailasa Gounder, there was some confusion in the family and business affairs of the firms in which Kailasa Gounder was interested. I do not think it possible to discredit the evidence given by the second respondent himself in which he stated that he remained in Erode for sometime after his uncle's demise for the purpose of attending the funeral etc. From the evidence of the sixth respondent himself as R.W. 1, it is found that the second respondent attended the funeral and was also

visiting Kailasa Gounder's house off and on for sometime. R.W. 1 has also stated that the second respondent had his own house in Erode and also had an establishment in a village nearby. From the evidence of these two persons *viz.*, respondents 1 and 2, I am satisfied that the second respondent had moved out of Madras for the purpose of attending the funeral of his uncle and also for the purpose of attending to the affairs which arose consequent on the demise of Kailasa Gounder. It is not disputed that the second respondent was not available at premises No.10, Kasturi Ranga Iyengar Road on the 1st, 2nd and 4th of March, 1976. However, the reason for his absence is clear *viz.*, to attend the funeral of his uncle and to the affairs which arose consequent on the demise of his uncle. On the death of Kailasa Gounder the second respondent was the seniormost among the two families. Even during the time of Kailasa Gounder it is in evidence that Kailasa Gounder and the second respondent were mainly looking after the affairs of the first respondent-firm. It is in these circumstances not inconceivable that the second respondent went to Erode and stayed on for the purpose of arranging all the affairs. It is not also, as if the second respondent shut up his shop and made himself scarce with a view to evade his creditors. The notices that were despatched to 10, Kasturi Ranga Iyengar Road on the 5th March, 1976, had actually been received at the Erode address. This itself goes to show that arrangements had been made for the purpose of seeking that communications could be had with him and the firm. It appears from the evidence that No. 10 Kasturi Ranga Iyengar Road was not completely closed and that a person by name Singaram was available to tell the parties as to where the respondent were, I am not, therefore, satisfied on the facts herein that the respondents have committed any act of insolvency as provided in section 9 (*d*) (ii) of the Presidency Towns Insolvency Act.

9. The said provision runs as follows: A debtor commits an act of insolvency in each of the following cases, namely:- (*d*) If, with intent to defeat or delay his creditors :

(*i*) he departs or remains out of the State;

(*ii*) he departs from his dwelling house or usual place of business or otherwise absents himself.

(*iii*) he secludes himself so as to deprive his creditors of the means of communicating with him".

From the language of the provision itself it is clear that the act of insolvency is taken as committed only where a person departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. At page 84 of Mulla's Law of Insolvency in India, Third Edition, it is stated in paragraph 103 as follows :

"All the acts mentioned in this clause 9 (*d*) (ii) are in themselves innocent, and to make them acts of insolvency, it is necessary to prove that the act was done with intent to defeat or delay creditors".

In paragraph 105 it is stated as follows:-

"Absenting oneself is no act of insolvency unless it be with intent to defeat or delay creditors. Whether that intention exists is a question of fact...... If a trader shuts up his shop during business hours.....without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors; but the absence may be satisfactorily accounted for and the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind or has left a direction that letters are to be addressed to him at a particular place."

In the present case, therefore, it is necessary to see whether the second respondents who alone was the resident in the said premises at No. 10, Kasturi Ranga Iyengar Road, had left the place with intent to defeat or delay creditors. There can be no presumption on the facts herein that his departure from the place was with intent to defeat or delay the creditors because he had left a repre-

sentative behind. The letters addressed to him had also been redirected to the address at Erode and there is also a valid explanation as to why he was not present in Madras at the relevant time. It is common knowledge that ceremonies in connection with the demise of a Hindu take nearly a fortnight, and therefore, there is nothing surprising if he was away from Madras during the period of a fortnight commencing from 19th February, 1976 when Kailasa Gounder died. In the context of the explanation, it is reasonable to draw the inference that the absence of the second respondent from the said premises was not with a view to defeat or delay creditors. In the context of the appropriate instructions having been left for the purpose of communications reaching him, I am not at all satisfied that he was making himself scarce with any intent to defeat or delay the creditors. The first respondent being a firm could only act through a human agency and in the present case it is only the second respondent who, according to the petitioners, was representing the firm at Madras. Therefore, whatever applies to him would equally apply to the first respondent. There is nothing to show that the branch was closed with a view to defeat or delay creditors. Further there could have been no difficulty about contacting it at the Erode address. The other respondents who came to Madras casually stayed in the said premises. They cannot be charged with having departed from the place in which they did not reside. All of them have their own residences in Erode and other places and, therefore, they cannot be charged with having absented themselves from the said premises with intent to defeat or delay the creditors.

10. A similar situation arose for consideration by a Bench of this Court in *M. Ratchanganadan* v. *Messrs. Kishindas Shamdass*[1]. In that case, there was a cashewnut business in Panruti. It had also an address in Madras. The money had been borrowed from the Madras address. The notice addressed, to the said place in Madras was returned. It was, therefore, alleged that the debtor had committed an act of insolvency by departing from his place of business in Madras with intent to defeat or delay the creditors. It was pointed out at page 550 of the judgment as follows :

> "We need not stress that insolvency is a status to which no person should be reduced, unless as act of insolvency is fully established to the satisfaction of the Court. A creditor, in particular, ought not to be permitted to utilise this mode of obtaining an adjudication as insolvent, as a kind of pressure, in order to realise a debt more economically or by swifter means".

In that case it was held, differing from the trial Court, that the adjudication of the debtor was wrong, as the temporary absence of the debtor from Madras was not with a view to defeat or delay his creditors. The same conclusion should follow in the present case.

11. In paragraph 245 of Volume 3, Halsbury's Laws of England, Fourth Edition dealing with Bankruptcy and Insolvency, the following passage occurs :—

> "The onus of proving that the debtor remained out of England with the intent to defeat or delay creditors rests on the petitioning creditor, and though proof must necessarily be a matter of inference from the circumstances of each case, it is wrong to hold that it can only be discharged by showing that the existence of the intent is the only possible explanation of the debtor's conduct; the standard of proof required demands at least that the Court should be satisfied that in all the circumstances of the case the presence of intent to defeat and delay creditors is so much the most probable explanation of the debtor's conduct as to make it in effect the only probable one".

In the present case having regard to the peculiar facts, it cannot be said that the absence of the second respondent from the Madras premises was only with a view to defeat or delay the creditors

1. (1966) 2 M.L.J. 548 : 79 L.W. 617 : A.I.R 1967 Mad. 279.

or most probably with a view to defeat and delay the creditors. The more probable explanation is that he was away because of the unfortunate demise of his uncle. I therefore, hold that the petitioning creditors have not made out any act of insolvency as contemplated by section 9 (*d*) (ii) of the Act in either of those two petitions.

12. I have now to consider the question as to whether the act of insolvency contemplated by section 9 (*g*) of the act has been made out here. Section 9 (*g*) runs as follows:—

> "A debtor commits an act of insolvency in each of the following cases, namely:—
>
> (*g*) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

What constitutes an act of insolvency under this provision may now be considered before going into the evidence, as the evidence has to be examined in the light of the necessary requirements of the law. In paragraph 112 of Mulla on the Law of Insolvency in India, Third Edition at page 94, it is stated as follows:

> "What the section requires is notice of suspension of payment. Therefore, mere suspension of payment will not suffice......
>
> It is important to note that suspension of payment is something different from and over and above inability to pay. A statement made by a debtor to a creditor that he is unable to pay his debts does not of itself and without reference to context or circumstances amount to a notice that he has suspended or is about to suspend payment of his debts so as to constitute an act of insolvency within the meaning of this section. Such a statement may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances to which one is entitled to look for the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due. 'The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts—that is to say, to abstain from paying his debts as they fall due, at least for a time'."

At page 95, paragraph 120, it is stated as follows:—

> "The test whether or not a notice amounts to an act of insolvency under this clause, lies in the effect which the notice would produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors. If the language of the notice can only lead the creditor to infer that if an offer of composition made by the debtor is not accepted, suspension is the only alternative, it amounts to a notice that the debtor is about to suspend payment of his debts. A mere statement of debtors that they are unable to pay their debts, however, insolvent they may be is not a notice within the meaning of the Act, that they are suspending or about to suspend payment."

13. In *Ramaswami Chettiar and another* v. *Muthialuswami Chettiar*[1], the question as to whether the debtor had suspended payment arose on the following facts: The debtors in that case were carrying on business and were in involved circumstances. There was a pressure for payment of debts. On one such occasion when the creditors made a demand for payment, the debtors offered their properties consisting of two houses and a garden, omitting the house in which they were living in discharge of the debts. No settlement was reached on that day. Subsequently, a few days later, there was a discussion between the debtors and creditors as to how the debts were to be discharged. It was stated on that occasion that the title deeds for the sale of the properties had

1. A.I.R. 1928 Mad. 903.

been given to one of the creditors. On these facts, this Court held as follows:—

> "In the case before us though all the creditors might not have been present there is no doubt that what was discussed at the meeting was the payment of all the creditors and the impression that was left on their minds was that the appellants were unable to pay debts and would suspend payment of debts unless this offer of discharge of all the debts by the sale of the properties is accepted."

On the facts it was held that there was an act of insolvency.

14. In *Gangu Veera Brahman* v. *Gangu Jaganadhacharyulu and another*[1], the debtors sold their property and offered to make a rateable distribution among their unsecured creditors, after satisfying the mortgage debt, of the balance of the sale proceeds. The amount so available for distribution was three annas nine pies in the rupee for each creditor. There was thus intimation to the creditors that the debtors did not intend to pay anything unless the creditors agreed to accept in full settlement the small amount which they offered. It was held on these facts after discussing certain decisions as follows:—

> "Now applying these criteria to the present case, we feel no doubt that the intimation given by the debtors to the petitioner amounted to a notice that they had suspended or were about to suspend payment of their debts. The debtors were in insolvent circumstances. The sale of their property was the last resource available to them for meeting their creditors' claim and the sale proceeds were far from sufficient to pay those claims in full. We think it clear that when the debtors informed the petitioner that they could pay not more than three annas nine pies in the rupee to their creditors they in effect gave notice that they were about to suspend payment of their debts. That was an act of insolvency."

1. (1935) 69 M.L.J. 184 : 42 L.W. 427 : A.I.R. 1935 Mad. 589 (2).

15. In *Chorahalu Siva Reddi and another* v. *The Official Receiver of Bellary and others*[1], there was a partition among three members of a joint family. One of the brothers was in sole and exclusive charge. When he was approached for repayment of the debts by the petitioning creditors he stated: 'I cannot pay your debts: you can do what you like.' This was construed to be an act of insolvency within the meaning of section 6 of the Provincial Insolvency Act corresponding to section 9 of the Presidency Towns Insolvency Act.

16. The essence of an act of insolvency under this head is as shown by these decisions, that the debtor must give sufficient indication to show that he had suspended payment of all the debts. No particular form of expression is necessary. What is necessary is that the words should unmistakably leave the impression in the mind of the creditor that the debtor has actually suspended or is about to suspend payment of all his debts. The words used by the debtors must be reasonably construed. A creditor cannot approach the Court with a petition for insolvency by merely misunderstanding what was stated by the debtor.

17. In the present case, as already seen, there were two meetings held on 7th April, 1976 and 8th April, 1976. The alleged act of insolvency *viz.*, of suspension of payment, was said to have taken place only on 8th April, 1976. On 7th April, 1963 S. V. Balasubramaniam, the fifth respondent and V. K. Swamirath the sixth respondent were present. The evidence recorded goes to show that the fifth respondent telephoned P.W. 1 from Ashoka Hotel asking him to meet him at the said Hotel for solving the problem of discharging the debts. P.W. 1 went which Mothiram and Biharilal (P.W. 3). Only the fifth respondent and the sixth respondent were there. P.W. 1 in his evidence stated: "They were telling that they wanted to settle with the creditors." At another place P.W. 1 said that they

1. (1936) 71 M.L.J. 730 : 44 L.W. 651 : A.I.R. 1937 Mad. 13.

wanted one year's time stating they were unable to pay. At another place he stated: "They said they cannot pay; they have suspended payment and asked to wait". In the course of the cross-examination the witness stated: "They stated that they can settle. I do not represent all the creditors and must call all of them". In the cross-examination the following question was put to him by Mr. Sivaramakrishniah appearing for respondents 5 to 9.

> "Q. At this meeting they stated that they would like to settle and you wanted a regular meeting?
>
> A. We will discuss further how to settle it at a regular meeting".

P.W. 3 in the course of his deposition regarding the meeting on 7th April, 1976 stated as follows:—

> "Q. What did they say?
>
> A. They said tomorrow we will fix a meeting at the same place. You call the other debtors also and we will call our guarantors and we will see tomorrow."

Further he said as follows:—

> "Q. What happended as a result of the meeting?
>
> A. Nothing happened as a result of the meeting with these two persons except saying 'meet tomorrow'. He said all other guarantors and persons are coming from Erode tomorrow. We will meet."

P.W. 4 also stated in the course of his deposition:—

> "We discussed with the two partners. They told us that they would be calling the other partners also the next day and that we might have a fuller discussion then. We again met on 8th April, 1976, at Ashoka Hotel (in the room above the reception). I do not remember the number of the room".

Thus, taking the evidence let in on behalf of the petitioning creditors alone, it is clear that the meeting on the 7th was only a preliminary meeting with the two or three creditors by the two debtors and that a further meeting was to be held on 8th April, 1976. Therefore, as far as the meeting on 7th April, 1976 is concerned, there was no question of notice of suspension of payment coming within the scope of section 9 (*g*) of the Act.

18. I now have to discuss about the meeting of the 8th April, 1976, in which, according to the petitioning creditors, there was a notice of suspension of payment. P.W. 1 stated that the debtors on that day were three in number *viz.*, the fifth respondent, the sixth respondent and the third respondent. There were a few other persons present at the said meeting. One was Mr. Rajaram, a former Minister of this State. The other persons present included V. R. Balasubramaniam, P. Sengottian, Director of Janardhana Mills Ltd., G. Sriranga Gounder father-in-law of the second respondent, K. N. Kandaswamy and Vardamanan, Chairman of Lakshmi Vilas Bank. A number of creditors were present on that day. The total number, who were present either on behalf of the creditors or on behalf of the debtors, was between 35 and 40. In the course of the deposition, P.W. 1, stated that the debtors were not able to pay any amount, that they said that they must be given time for one year and that they suspended the payments for one year. In the course of his deposition he further stated that each party put forward the ways and means to settle the creditors of the first respondent. P.W. 2, in his deposition stated as follows:—

> "The debtors represented to us that one of their partners Kailas Gounder had expired and other partners internally are not co-operating with each other and therefore in these circumstances it is not possible to make us any payment. So we hereby suspend the payment at least for a period of one year and we will not be able to pay. If you agree to this, well, otherwise go and do whatever you like."

P.W. 4, in the course of his deposition has stated the following regarding what happened on 8th:—

"We are about 35 to 40 persons, both creditors as well as debtors and their relations. Other than the debtors, there were a couple of persons. One was Mr. Vardhamanan, Chairman of Lakshmi Vilas Bank and the other was the Chairman of the Karur Vysya Bank. They had also lent monies to them to a great extent. On that day, we discussed about the re-payment plan, and the same expression was made by the debtors stating that assets could not be liquidated, particularly because Kailasam died, and everything was in a mess and the partners were not co-operating and coming forward to pay the monies."

Though the examination of the witness had gone on a wide range, the above represented the crucial passages regarding the allegation of suspension of payment. The question is what is the impression that could have been left in the minds of the debtors at such a meeting.

19. At this stage I may deal with one argument which was advanced on behalf of respondents 1 and 3 by Mr. Dolia, learned counsel who appeared for them. The submission of Mr. Dolia was that the meeting was confined to a few of the creditors and that any statement made in such a meeting could not be equated to a suspension of payment which, in order to fall within the scope of section 9 (g) of the Act, should be with reference to all the creditors. The learned counsel appearing for the other respondents did not take up this stand. I am not satisfied that this submission of Mr. Dolia, is correct. It was not as if the meeting was confined to the Multani bankers alone. There were large amounts due to the Karur Vysya Bank and the Lakshmi Vilas Bank. Their representatives were also present. I do not, therefore, consider that at the said meeting any declaration that was made was given only in relation to Multani bankers who were singled out for any separate treatment. At any rate, this aspect had not been adverted to even in the counter-affidavit filed on behalf of respondents 1 and 3 and I do not think that this plea merits any further discussion before rejection.

20. Yet another contention on behalf of the other respondents was that the said meeting was merely for the purpose of working out a plan for liquidating the debts or for settlement of the liability and that no expression was used which could convey the impression to any of the creditors that the debtors were about to suspend payment. One crucial aspect which deserves to be noticed now is that apart from examining the four witnesses, who are either creditors of the first respondent firm or of some other entities in which Kailasa Gounder and others were interested, the petitioning creditors have not examined any of the other persons present at that meeting. For instance, if either of the two representatives of the Karur Vysya Bank or Lakshmi Vilas Bank had been summoned and examined, they would have furnished the most independent evidence on the point as to whether there was any suspension of payment on the said day. In the absence of any such independent testimony, I have to consider the correctness or otherwise of the plea of the petitioning creditors regarding the commission of act of insolvency only in the light of the evidence let in by either side. It is more or less a case of oath against oath.

21. At this stage, I may set out as to how this act of insolvency has been described in the petition itself. In paragraph 23 of I.P. No. 41 of 1976 it is stated as follows:—

22. On 8th April, 1976 a scheduled meeting was held at Room No. 408, Hotal Ashoka. The meeting was held between 3 and 5 P.M. The third debtor, 5th debtor, 6th debtor and one V. R. Balasubramaniam, on behalf of the second debtor herein and P. Sengottian, Director and surety for Janardhana Mills Ltd., and G. Sriranga Gounder, father-in-law of the second debtor and the father of the third debtor and one K. N. Kandawamy, brother-in-law of the second debtor were present and represented the debtors herein. On

behalf of the creditors including the petitioning creditors herein, the following persons were present:—

1. Prabhudas Gurumukhsingh.

2. Bhajandas Ramchand.

3. Atmaram Sadhuram.

4. Motiram Newendram.

5. Biharilal Prakashlal.

6. Hassasinghlal Singh.

7. Arjundas Gokuldas, partner Dharamdas Gokuldas; and

8. Seth Khiaram Khushiram,

the first petitioning creditor herein:

"One secured creditor Lakshmi Vilas Bank represented by their Chairman Sri Vardamanan was also present. The debtors expressed their inability to pay the amount immediately and stated everything is in a dismal state due to sudden death of the partner V. M. Kailasa Gounder and they further represented that the accounts were not kept properly and they said that it is not possible for them to discharge the huge liability incurred as no partner is coming forward to give their share of debts and to co-operate to discharge the debts. They said, therefore, 'they could not make the payment and they will not be in a position to pay the amount in the near future for nearly one year and thus suspended the payment.' They further said that "The creditors can do whatever they want to do." Thus the debtors have suspended the payment and have committed Act of insolvency squarely within section 9 (g) of the Presidency Towns Insolvency Act."

In paragraph 8 of the petition (I.P. No. 46 of 1976) the following passage occurs:—

"Again the meeting was adjourned to 8th April, 1976 and in that meeting several creditors were present of which the partner of the first petitioning creditor also participated. The names of the persons representing the creditors are given as under:—

1. Prabhudas Gurumuksingh.

2. Bhajandas Ramchand.

3. Atmaram Sadhuram.

4. Motiram Newendram.

5. Biharilal Prakashlal.

6. Hasasinghlal Singh represented by Mohan Singh.

7. Arjundas Gokuldas.

8. Seth Khiaram Khushiram.

on the side of the debtors 5th and 6th debtors and one V. R. Balasubramaniam representing on behalf of the second debtor P. Senkottaiyan, Director of Janardhana Mills Limited, G. Sreeranga Gounder, father-in-law of the second debtor and the father of the third debtor, K. N. Kandaswami, brother-in-law of the second debtor represented all the debtors and in addition the chairman of the Lakshmi Vilas Bank, Sri Vardhamanan was also present in that meeting. The debtors expressed their inability to make payment to the creditors owing to the non-co-operation of the partners and also gave notice of suspension of payment of all their debts. The effect of the said meeting is that they have clearly expressed their intention in suspending the payment to all their creditors of their debts. This action on the part of the debtors would amount to the act of insolvency under section 9 (g) of the Presidency Towns Insolvency Act."

Paragraph 8 of I.P. No. 46 of 1976 is somewhat an improved version of paragraph 23 of I.P. No. 41 of 1976. In neither petition it was stated that the debtors actually used the expression "Suspension of payment." But the witnesses for the petitioners have spoken to such expressions being used as is shown by the extracts given above. I am satisfied that the version in the depositions as if they used the expression of suspension of payment is not correct. If that was the expression used, that would have found a place in the petitions.

23. It is necessary to remember the course of events on and from 19th February, 1976. Mr. Kailasa Gounder died on that day. Immediately on his death there were certain claims made

against the said Kailasa Gounder personally and for this purpose a committee of five persons had called for the particulars of the amount due to any persons who claimed to have made any deposit with Kailasa Gounder. On 31st March, 1976, V. P. Muthukumaraswamy who, it is clear from the evidence, was attending to the affairs of the business of the first respondent along with Kailasa Gounder had been arrested and detained and had been taken to Coimbatore. The other persons had left the affairs either in the hands of Kailasa Gounder or in the hands of the second respondent. The fifth respondent was employed in Sakthi Sugars. His brothers were not in business. One of the creditors of Janardhana Mills had filed a suit and obtained an order of attachment of the moveables of the fifth respondent.

24. In order to get the attachment set aside, the fifth respondent came over to Madras on the 7th April, 1976 accompanied by the sixth respondent to whom the fifth respondent had telephoned before he left for Madras. On the 7th, it is only these two persons who were present at the meeting. On the 8th the third respondent joined them. Notices had been received from several of the Multani creditors. As far as the first respondent-firm is concerned, the amount due to the Multanis came to about Rs. 12,00,000. If the liabilities of Janardhana Mills Limited are also taken into account, the total liability to the Multani bankers would have been about Rs. 22,00,000. A reply notice, had already been given on behalf of the second respondent. In that reply notice, which is marked as Exhibit P-5 and which is dated 20th March, 1976 it is stated that consequent on the sudden death of Kailasa Gounder who was managing the firm, products were not moving fast, that recent developments had also contributed to a slump in the trade and that the firm was making arrangements to pay its just dues. It was therefore, requested that those who had issued notices should not take any hasty step which may tend to mar the cordial relationship that had been existing between the creditors and the first respondent-firm to their mutual advantage. From the reply itself it is clear that the firm was making a arrangements to pay its just dues when the parties came to Madras on 7th April, 1976; they could thus have come with a view to find out how best to settle all the liabilities that were due by the first respondent-firm. From the fact that subsequently there were several meetings even after the filing of the insolvency petitions, it is clear that the respondents, who participated in the meeting on 8th April, 1976, were only trying to see how best the affairs relating to the debts due by the first respondent-firm could be settled. It is rather curious to find that in paragraph 20 of the petition in I.P. No. 41 of 1976 the second respondent is said to have told the creditors, who met him, that the assets were worth only Rs. 90 lakhs and the liabilities were Rs. 1¼ crores while in I.P. No. 46 of 1976 in paragraph 8 it is stated that the liabilities came to nearly two lakhs of rupees as against their assets of Rs. 90,00,000 as estimated by them. Though the persons who are said to have made the declaration as set out in paragraph 8 of the petition in I.P. No. 41 of 1976 are different from the person who was said to have given out the value of the assets and liabilities in I.P. No. 41 of 1976, still the difference in the version itself goes to show that both the versions could not be true at the same time. There is no independent evidence to confirm these versions. Further the respondents in their evidence have stated that their assets exceed their liability and that they are not in a position to pay immediately only because the assets are in the shape of immovable properties and machineries etc., which lack liquidity. Even in the evidence of P.W. 1 it was only stated that only four creditors said that the assets were worth Rs. 90,00,000 and the liability Rs. 1½ crores and that the debtors did not say so. In the face of these statements, I am not at all satisfied that in the present case the debtors were summoning the creditors for the purpose of announcement to them that they were in such a hopeless condition, that they would have to settle with the creditors at a

rateable amount or that if they did not wait for a period of one year or so, they could take whatever steps they liked. Significantly enough this meeting has been summoned by the debtors themselves. Though there were some pending proceedings in which action had been taken for attaching the moveables belonging to one of the respondents, still the evidence does not establish the existence of such a scramble or pressure that they had to summon the creditors and sue for peace by asking them to wait for some period or for telling them that they could do whatever they liked if they did not wait. I am unable to draw an inference on the facts herein that the respondents were declaring that they were suspending payments or words to that effect so as to come within the scope of section 9 (*g*) of the Act. The whole discussion of the 8th April, 1976 in my opinion, was only with a view to find out how best to evolve a scheme for the settlement of all the liabilities. What happened on 8th April, 1976 was only a discussion for the purpose of discharging the debts in a satisfactory manner, and not a declaration that there was any suspension of payment. In fact the conduct of the debtors subsequently goes to confirm that they were making efforts to pay the liability. They paid Rs. 2,00,000 and also gave a power of attorney in favour of Mr. R. Krishnaswami, Advocate, in order to enable him to sell No. 10, Kasturi Ranga Iyengar Road. It is true that the sale could not go through because one of the persons, who resided there, would not vacate the premises. At the time when the power of attorney was given, the parties could not have anticipated this difficulty and it is not even suggested that the power of attorney was given only with a view to bide time and was not a *bona fide* attempt at selling the property bearing Door No. 10, Kasturi Ranga Iyengar Road, and repaying the creditors.

25. Mr. R. Krishnaswami in a very vehement argument submitted that the fact that the debtors were driven to the necessity of having to sell a property which did not belong exclusively to them itself went to show that they had not enough resources to repay all the debts. From the evidence of the respondents, it appears that they have large immovable properties in Erode and nearby places. It also appears that they have installed valuable machinery for the purpose of the distillery which was owned by Kamadhenu Drinks, the first respondent. Though there may be some difference of opinion regarding the estimate of valuation of the properties, still it is not as if the respondents were in such a hopeless condition that they had to suspend payment. The contemplated sale of the Madras property was probably motivated by the fact that it is easier of realisation being a property in the city. I am unable to draw the inference that the offer of sale of the Madras property was itself proof positive of the hopeless condition in which the debtors were placed. Mr. Krishnaswami drew also my attention to Exhibit B-34. That is a communication dated 7th April, 1976 from the Commissioner of Land Revenue, Prohibition and Excise. The first respondent had given a security *i.e.*, land building, distillery etc., and estimated their value at Rs. 27.15 lakhs. This had been offered as security for a sum of Rs. 10,00,000 for which the Government wanted a security. In the said communication it was pointed out by the Board of Revenue as follows:

> "The Board has already considered their request carefully and informed them its decision in its letters dated 17th March, 1976 and 1st April, 1976. The properties are heavily encumbered to the tune of Rs. 74 lakhs, according to the petitioners. Interests on the said loans are accruing. The value of the lands are stated to have been estimated on the basis of a high rate. The valuation in respect of the buildings, distillery unit, etc., have evidently been given without taking into account the depreciation etc. The Hon'ble High Court has also observed that if the Board of Revenue considers that the property offered as security cannot be accepted on the ground that they are insufficient as security having regard to their value, the petitioners are at liberty to offer other properties

as security within four weeks from the date of the interim order. The petitioners are therefore, advised to furnish suitable and acceptable security in accordance with the instructions already issued in this matter within the time stipulated."

The inference sought to be drawn by the learned counsel from this letter is that the Government itself had pointed out that the respondents were heavily involved in debts for over Rs. 74 lakhs on the properties and that therefore, the Government insisted on the respondents to furnish further security. Merely because the Government wanted some security in accordance with certain regulations under the Excise Act, it does not follow that the respondents were involved circumstances so as to be unable to pay their debts. It may be that the Government considered that the security offered by the respondents was not sufficient. But that does not mean that there was any independent valuation made by the Government of the assets and liabilities belonging to the respondents in their entirety so as to show that they were in insolvent circumstances.

26. The learned counsel for the petitioners also submitted that the properties belonging to the first respondent had been transferred to a company called Coimbatore Alcohol and Chemicals Private Ltd. and that that itself showed that the first respondent did not have any property so that it had to be adjudged as an insolvent. With reference to this aspect, there is the evidence of the respondents which goes to show that the Tamil Nadu Industrial Investment Corporation and the Banks which had advanced monies to the respondents were insisting on the business of the first respondent being vested in a limited company. It is not clear as to how the interests of the institutions which lent the money are better safeguarded if the assets were vested in a Limited Company. However, it is unnecessary to go into this aspect for my present purpose. It is clear from the exhibits and the evidence that even during the lifetime of Kailasa Gounder there was such a request and time had been taken for the formation of a Limited Company. The Limited Company itself was formed on 16th March, 1976. It commenced business soon thereafter. A partnership deed taking it as a partner was executed on 1st April, 1976 and subsequently on 10th April, 1976 this partnership was dissolved when the said Coimbatore Alcohol and Chemicals Private Limited took over the assets. It is no doubt a cleverly designed scheme of transferring the properties of Kamadhenu Drinks in favour of Coimbatore Alcohol and Chemicals Private Limited without incurring the stamp duty and other tax liabilities. The fifth respondent made no bones about the intention behind the introduction of the Limited Company as a partner and the subsequent dissolution of the firm within a few days so as to vest the assets of the first respondent firm in the Limited Company. The motive behind the said arrangement was said, to be to save stamp duty and the capital gains tax liability. If the firm had sold the assets directly to a Limited Company, then the sale would have attracted the Capital Gains Tax if the sale was for a price higher than the original cost. If the assets are taken over by a partner from the firm in which he is a partner on the dissolution of the firm, then there is no sale, as such, and it would only be a settlement *intenese* of the rights and liabilities of all the partners. The transaction was, therefore, put through on the basis that Coimbatore Alcohol and Chemical Private Limited was a partner on 1st April, 1976 and that the firm was dissolved on 10th April, 1976 when the assets were taken over by the said firm. I am not concerned with the motive behind the transaction or its effectiveness in avoiding the tax liabilities. I am now concerned to find out whether the vesting of the assets of the first respondent in Coimbatore Alcohol and Chemicals Private Limited was such as to show that the first respondent and others had committed an act of insolvency. The transaction of vesting itself was not challenged in the present proceedings as an act of insolvency. The learned counsel for the petitioning creditors relied on this transaction only to show that the assets of the firm had ceased to exist. This was not even pleaded. I do not, therefore, think it neces-

sary to examine a contention which is not even based on the pleadings.

27. Thus, having given my anxious consideration to the submission made on behalf of the petitioning creditors I am not at all satisfied that any act of insolvency had been committed by the first respondent or by other respondents. The case under section 9 (g) has not also been made out before me.

28. In this view, it is unnecessary to go into the question as to whether the fifth respondent had retired from the firm so as not to be liable to the petitioning creditors or others. This is a matter which can be gone into in any other appropriate proceedings. When there is no act of insolvency, the question as to whether it is a joint act of the partners or not does not arise. The result is that these petitions are dismissed with costs.

S.J. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

R. Sivagnanam .. *Appellant**

v.

P. K. Sadananda Mudaliar .. *Respondent.*

Succession Act (XXXIX of 1925), section 263—Revocation of grant—Principles governing—Revocation to be for a just cause.

The grant of a probate may be revoked for a just cause; "just cause" is explained in the body of section 263 of the Indian Succession Act itself. The various clauses which explain the expression "just cause" provide guidelines for the Court, whose assistance is sought for revocation of a proper grant under the Act. As revocation of a grant implies the effacement of the earlier valid judicial order of a Court, not only there should be caution in acceding to such a request but strict proof of the existence of one or other of the circumstances enumerated in the *Explanation* to section 263 of the Indian Succession Act is necessary before the Court could accede to such request. Revocation should be for a just cause. It should be a just cause which would enable the Court to revoke the grant. No doubt it is fundamental that a judgment of a Court of probate being a judgment *in rem* should be pronounced in the presence of all the parties. Absence of just cause cannot be presumed on an *a priori* consideration. [*Paras.* 6, 7.]

Case referred to:—

Anil Behari Ghose v. *Smt. Latika Bala Dasai*, 1955 S. C. J. 578: (1955) 2 S.C.R. 270: (1955) 2 M.L.J. (S.C.) 84: A.I.R. 1955 S.C. 566.

Appeal under Order 36, rule 1, O.S., rules and clause 5 of the Letters Patent against the order of N. S. Ramaswami, J., dated 15th August, 1975 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application No. 329 of 1972 in T.O.S. No. 2 of 1957.

G. Krishnan, for Appellant.

V. R. Gopalan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—One Thangavelu Mudaliar died leaving behind him a will duly executed by him in proper form. He died in August, 1956, leaving behind him his daughter Krishnaveni Ammal. Krishnaveni Ammal had two children—Sadanandam, a son, and Saraswathi Ammal, a daughter. It is common ground that Sadanandam was named as the executor under the will and he sought for probate in the usual course and in the common form. Originally the proceedings came up before Gana-

*O.S.A. No. 28 of 1973. 5th April, 1977.

patia Pillai, J., who, after having been satisfied that a grant could be made in the common form, was about to issue it, when he was interdicted by caveat proceedings. Krishnaveni Ammal filed a caveat as an interested person, and thereafter the proceedings were converted into a suit, T.O.S. No. 2 of 1957. On a verification of the record, we find that in the course of the proceedings two witnesses were examined. P.W. 1 was Sadanandam, the propounder of the will, and P.W. 2 was Swaminatha Achari, one of the attestors to the will, who also filed, along with the application for the issuance of the probate, the supporting affidavit so as to enable the propounder to obtain a probate after proof of the will in the common form. But, at that juncture, it appears that Krishnaveni Ammal withdrew her caveat. In those circumstances Ganapatia Pillai, J. observed—both sides agree that the probate asked for could be issued. He imposed certain conditions for the issuance of the probate. His order is dated 22nd January, 1960. Nearly 12 years thereafter Saraswathi Ammal's son one Sivagnanam filed the present application for the revocation of the grant in favour of Sadanandam. According to the applicant, who is the appellant before us, the grant of the probate was defective inasmuch as all the persons, interested in the grant were not before the Court. Secondly, he would say that the grantee did not pay the probate duty in time and when he sought the indulgence of the Court for excusing the delay in making payment of such probate duty, he made a false allegation and that averment, which is admittedly false, by itself would enable him to obtain a reversal of the grant under section 263 (*c*) of the Indian Succession Act. Thirdly, the contention was that the inventory was not filed by the grantee of the probate as directed by the Court and this inaction on the part of Sadanandam is another matter which ought to be taken into consideration for the revocation of the grant and that this is possible under section 263 (*e*) of the Indian Succession Act.

2. This application was resisted on the ground that there was no defect in the procedure and that the alleged false allegation was not at a time when the grant of probate was sought for and that the delay in filing of the inventory was excused by this Court by an order of Maharajan, J., and therefore, the three grounds on which revocation of the grant was sought by the applicant are unsustainable as not being available to him.

3. N. S. Ramaswami, J. rejected the application for the revocation of the grant holding that there was no defect is the procedure and that even if the grantee Sadanandam made a false allegation while seeking for an order for excusing the delay in the payment of the probate duty, it would not vitiate the grant as such an allegation was not made in the course of the proceedings resulting in such grant. And lastly, in view of the order of Maharajan, J., who excused the delay in filing the inventory by the executor, the third ground also was not open to the applicant. He dismissed the application. Hence the appeal.

4. The three grounds pressed before the learned Judge are repeated before us. Mr. Krishnan, learned counsel for the appellant, would contend that there is a defect in the procedure since the order of Ganapatia Pillai, J., which is speaking, would say that the grant was by consent and as such a grant cannot be made by consent of parties, this itself is sufficient to vitiate the proceedings. Secondly he would say that the false allegation made at a time when seeking for an order to excuse the delay in the payment of the probate duty, is an allegation which should be deemed to have been made in the course of the proceedings relatable to the grant, and that, therefore, the grant is vitiated and it ought to be revoked.

5. Probate being a document issued under the seal of Court and is demonstrative evidence of the executor's authority to act, is a solemn document. There are two modes by which probate can be granted. It could be proved in the common form or in the solemn form. When the Court is satisfied that sufficient proof is available on record of the execution of the will and when it is corroborated by

the evidence of the available attesting witness, then it has the judicial discretion to grant such probate. But when its conscience provokes it to have the will proved in the solemn form which requires proof of execution of the will or its genuineness in the presence of interested parties, it should demand such proof from the propounder of the will. In the instant case, Sadanandam, son of Krishnaveni Ammal, as executor sought, for such a probate in the common form. N. S. Ramaswami, J., in his judgment specifically referred to the fact that proof affidavits from the attestors of the will had been filed along with the petition for probate. There was, therefore, enough material before the Court to issue a fiat and thus order probate of the will. But due to the intervention of Krishnaveni Ammal, who entered a caveat, the proceedings were registered as a suit—T.O. S. No. 2 of 1957. We have already referred to the fact that two witnesses were examined, which included the propounder of the will and an attesting witness. An attempt was made to summon the advocate who drafted the will. It was only at that stage that the caveator withdrew her objections for the grant. It is in the light of such events which transpired before him Ganapatia Pillai, J. said that there was no objection for the grant. We have already referred to the alternative mode by which a probate could be granted. The learned Judge apparently was satisfied by the affidavits of proof filed by the attestors that the discretion exercised by him judiciously to grant probate in the common form cannot lightly be disturbed at this stage. No doubt the normal process initiated for the issuance of a probate in the common form was snapped by the intervention of the caveator who, afterwards, withdrew her objections. But this would not, in our view, render the grant in any way defective. The grant should be deemed, in the instant case, to have been made after the Court applied its mind to the hypothesis on record and the present hopelessly belated attempt on the part of the appellant to set at naught such a grant twelve years after it was made, is obviously a futile one and Courts, whose assistance is sought to revoke such a grant, ought to view the circumstances with strict caution.

6. The principles governing the revocation of the grant are specifically enumerated in section 263 of the Indian Succession Act, which reads as follows:

> "263. The grant of probate or letters of administration may be revoked or annulled for just cause.
>
> *Explanation*: Just cause shall be deemed to exist where:
>
> (*a*) the proceedings to obtain the grant were defective in substance; or
>
> (*b*) The grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
>
> (*c*) the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
>
> (*d*) the grant has become useless and inoperative through circumstances; or
>
> (*e*) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect".

The grant of a probate may be revoked for a just cause; "just cause" is explained in the body of the section itself. The various clauses which explain the expression "just cause" provide guidelines for the Court, whose assistance is sought for revocation of a proper grant under the Act. As revocation of a grant implies the effacement of the earlier valid judicial order of a Court, not only there should be caution in acceding to such a request but strict proof of the existence of one or other of the circumstances enumerated in the explanation to section 263 of the Indian Succession Act is necessary before the Court could accede to such request.

7. Revocation should be for a just cause. The illustrations to the section also provide some material to the Court as to when it could exercise its discretion to reverse a grant. Illustration (*ii*) to section 263 probably is the only material illustration which has an impact on the facts and circumstances of this case. Illustration (*ii*) runs as follows:

> "The grant was made without citing parties who ought to have been cited."

Then it would be a just cause which would enable the Court to revoke the grant. No doubt it is fundamental that a judgment *in rem*, should be pronounced in the presence of all parties interested, however slight such interest may be. But this is not axiomatic. Each case has to be decided on its own merit. Absence of just cause cannot be presumed on an *a priori* consideration. In the case before us, Krishnaveni Ammal entered her caveat as an interested person, but withdrew it unconditionally during the process of the enquiry. N. S. Ramaswami, J. was right when he said that there was enough material on record to grant a probate of the will in the common form. If, therefore, in a given situation when the Court found that the interested person has withdrawn the caveat, then it should reasonably follow that he had requisite judicial discretion to grant the probate provided the common form proof is made available by the propounder. There were no *prima facie* grounds for withholding such a grant under such circumstances. The only technical objection before us is that Ganapatia Pillai, J. observed that the probate was being granted by consent. Obviously this expression was used in a very wide sense by the learned Judge. Certainly we can assume that the learned Judge did never mean that the probate of the will can be granted by consent of parties. What obviously he meant was that at the particular time when the caveator withdrew from the proceedings, there was no objection for the grant otherwise, for there was material before him to issue the grant after having been satisfied that the normal method of the will was available on record. We have already seen that two witnesses were also examined one the propounder and the other the attesting witness. In the circumstances, therefore, we are inclined to think that when Ganapatia Pillai, J. said that by consent the grant was being made, it only meant that he was granting the probate because there could be no possible objection to the grant of probate of a will which has been proved in the common form. It should not, however, also be forgotten that when the caveator did not pursue the objection, by necessary implication the person interested did not question the genuineness or truth of the will. The present application for revocation on the ground that the proceedings for obtaining the grant was defective in substance has no merit, because in the circumstances of the case the Court should be deemed to have been satisfied about the common form proof of the will. Neither before N. S. Ramaswami, J. nor before us any attempt was made attacking the genuineness or truth of the will. It is in these circumstances we are unable to conclude that there was a defect in the procedure, as contended by the learned counsel for the appellant, within the meaning of clause (*a*) of the *Explanation* to section 263 which would in any manner vitiate the grant. The Supreme Court had occasion to consider the meaning of the expression "defective in substance" appearing in *Explanation* (*a*) to section 263 of the Indian Succession Act. In *Anil Behari Ghose* v. *Smt. Latika Bala Dasai and others*[1], the Supreme Court said that defective in substance means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. Therefore, to assert that in a proceeding which involves the grant of a probate or letters of administration, a defect in substance appears, the person challenging such a grant should be in a position to establish beyond reasonable doubts that the very foundation of the proceedings and the basis on which the proceedings started and proceeded, were irregular and defective. It is such a defect which goes to the root of the matter that

1. 1955 S.C.J. 578: (1955) 2 S.C.R. 270: (1955) 2 M.L.J. (S.C.) 84: A.I.R. 1955 S.C. 566.

it contemplated in *Explanation* (*a*) to section 263. The use of the expression by Ganapatia Pillai, J. that probate is granted by consent, which, as we stated earlier, was very broadly used by the learned Judge, cannot be taken undue advantage of by the counsel to make out a case of substantial defect in the proceedings. It was only the language used by the Court that was sought to be pressed into service. We do not find any irregularity which would shake the foundation of the proceedings resulting in the grant of the probate by the learned Judge. We are, therefore, unable to accept the first contention.

8. The second contention of the learned counsel for the appellant is that a false allegation was made at a time when the grantee sought for a favour from the Court to excuse the delay in the payment of the probate duty. It is no doubt true, as it transpired in this case, that in the affidavit in support of the application for excusing the delay in the payment of the probate duty, the grantee Sadanandam made a false allegation regarding his status. This is taken advantage of and placing reliance on *Explanation* (*c*) of section 263, Mr. Krishnan urges that the grant has to be revoked on the ground that it was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. There is a fallacy in this contention. The proceedings to obtain the grant terminates with the grant. The other ancillary matters relateable to the grant cannot be said to be proceedings to obtain the grant. After obtaining the grant the question of payment of probate duty comes in. In the instant case it was not paid in time. The grantee sought for excusing the delay in the payment of such fee. In the affidavit filed by him in support of such a request he made an allegation, which is untrue, and which related to his status. It cannot be said that such an allegation, even if untrue, relates to a fact essential in point of law to justify the grant. This is an event which is posterior to the grant. The person who made the untrue allegation has already obtained the grant. What is contemplated in *Explanation* (*c*) is the grant itself should have been obtained by means of an untrue allegation of an esssential fact. Therefore, we are of the view that the allegation in the affidavit in question cannot be said to be one which would come within the mischief of *Explanation* (*c*) of section 263, for, it is not one which was made for obtaining the grant. Section 263 (*c*) has no application at all and we do not agree with the second contention.

9. As regards the third contention, we have already observed that Maharajan, J., excused the delay in filing the inventory. *Explanation* (*e*) is pressed into service. *Explanation* (*e*) relates to a case where the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory, etc. When a learned Judge of this Court excuses such a delay in the exhibition of such an inventory which should follow up the grant, then it obviously means that the delay was neither wilful nor without reasonable cause. In any event, this objection is not open to the appellant after the delay in filing the inventory has been excused by an order of this Court.

All the three contentions raised fail. The appeal is dismissed. No costs.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

Marimuthu Muthiriar .. *Appellant**

v.

Ayyathurai .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 34, *rules* 7, 8 *and* 9—*Suit for redemption of usufructury mortgage—Mortgagee remaining* ex parte — *Suit decreed — Final decree passed straightaway—Procedure whether correct.*

Order 34, rule 7 (1) of Civil Procedure Code, undoubtedly contemplates the passing, in the first instance, of a preliminary decree in a suit for redemption. The Code says that in such a preliminary decree the Court is to order that an account is to be taken of what was due to the defendant (mortgagee) at the date of such decree for: (1) principal and interest on the mortgage; (2) the costs of suit, if any, awarded to him; and (3) other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage security together with interest thereon. That is under clause (*a*) of rule 7 (1). But there is clause (*b*) of the said sub-rule which says that the Court can declare the amount due on that date, without giving a direction in the preliminary decree for ascertaining the amount as contemplated under clause (*a*). [*Paras.* 4 *and* 5.]

The provisions contained in rules 7, 8 and 9 of Order 34, Civil Procedure Code, contemplating the passing of a preliminary decree first and a final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor has in fact deposited the mortgage amount even at the time of filing of the suit, it is not as if the Court has no jurisdiction to straightaway pass a decree for redemption without passing a preliminary decree and waiting for an application for a final decree to be filed. [*Para.* 8.]

Cases referred to:—

Roshan Lal v. *Dhuri Singh*, A.I.R. 1922 All. 479; *Manicka Chetti* v. *Kuppusami Asari*, A.I.R. 1926 Mad. 644.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 348 of 1975, preferred against the decree of the Court of the District Munsif of Tiruchirapalli in Original Suit No. 1916 of 1973.

R. Srinivasan, for Appellant.

R. G. Rajan, V. Radhakrishnan, N. Muthuswami and *G. Nagarajan*, for Respondent.

The Court delivered the following

JUDGMENT.—In this second appeal by the defendant the question raised is whether the trial Court was in order in passing a final decree for redemption without first passing preliminary decree. The plaintiff executed an usufructuary mortgage as per the original of Exhibit A-1, dated 28th August, 1971 in favour of the defendant for a sum of Rs. 2,000. The plaintiff deposited the sum of Rs. 2,000 in Court while filing the suit for redemption. The defendant did not appear to contest the suit. The trial Court straightaway passed a final decree for redemption following the decision in *Roshan Lal* v. *Dhuri Singh*.[1] It also fixed the mesne profits at Rs. 61 per month, on payment of the necessary Court-fee.

2. The defendant filed an appeal which was heard by the learned Subordinate Judge, Tiruchirapalli. He went into the question whether the Court can grant a final decree for redemption without granting a preliminary decree and held on the basis of the abovesaid Allahabad decision that it can be done. Therefore the decree granted by the trial Court was confirmed except regarding the question

*S.A. No. 1098 of 1976. *9th September*, 1977.

1. A.I.R. 1922 All. 479.

of mesne profits. The first appellate Court said that the quantum of mesne profits is to be determined by separate enquiry under Order 20, rule 12, Civil Procedure Code.

3. The defendant has filed the second appeal contending that the Courts below are not right in holding that in this case the passing of a preliminary decree can be dispensed with.

4. Order 34, rule 7 (1) of Civil Procedure Code, undoubtedly contemplates the passing, in the first instance, of a preliminary decree in a suit for redemption. The Code says that in such a preliminary decree the Court is to order that an account is to be taken of what was due to the defendant (mortgagee) at the date of such decree for: (1) principal and interest on the mortgage; (2) the costs of suit, if any, awarded to him; and (3) other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage security together with interest thereon. That is under clause (*a*) of rule 7 (1).

5. But there is clause (*b*) of the said sub-rule which says that the Court can declare the amount due on that date, without giving a direction in the preliminary decree for ascertaining the amount as contemplated under clause (*a*). In the present case, the plaintiff-mortgagor has deposited the mortgage amount of Rs. 2,000 even on the date of filing of the suit. The fact that the said amount is being deposited as the amount due to the mortgagee is also mentioned in the plaint. The defendant did not care to appear and contest the suit. Under such circumstance, the question is whether the trial Court was wrong in straightaway passing a final decree for redemption as it did.

6. As already seen, two alternatives are open in a suit for redemption. One is, the Court can give a direction in the preliminary decree for the ascertainment of the mortgage amount. The other is to determine the amount itself without giving a direction as aforesaid. In this case, undoubtedly the trial Court should be deemed to have declared the amount due to the mortgagee as contemplated under rule 7 (1) (*b*) of Order 34, Civil Procedure Code.

7. It is contended on behalf of the defendant-appellant, that he might not have had any objection for the passing of a preliminary decree for redemption and therefore he allowed the matter to proceed *ex parte* and had the correct procedure as contemplated in the Code of Civil Procedure, been followed, the plaintiff would have been obliged to file an application for a final decree in which the defendant would have received a notice and that after such notice, he would have had an opportunity to contend before the Court that amounts more than the sum of Rs. 2,000 were due to him. This is hardly acceptable. If rule 7 (1) stops with saying that the preliminary decree should direct ascertainment of the amount as mentioned in clause (*a*) of that Rule, the contention may have some force. But as already seen, there is an alternative clause, namely, clause (*b*) of rule 7 (1) which contemplates the Court declaring the amount due even at that stage without giving any direction for the ascertainment of the amount due to the mortgagee on a later date. This means the defendant should have appeared in Court and contested the matter if his case is that he was entitled to more than the sum of Rs. 2,000 deposited by the plaintiff. He, having not done so, it would not be open to him now to say that had the Court passed only a preliminary decree and gave notice on a final decree application, he would have have had the opportunity to put forth his case.

8. The provisions contained in rules 7, 8 and 9 of Order 34, Civil Procedure Code, contemplating the passing of preliminary decree first and final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor has in fact deposited the mortgage amount even at the time of filing of the suit, it is not as if the Court has no jurisdiction

to straightaway pass a decree for redemption without passing a preliminary decree and waiting for an application for a final decree to be filed.

9. In the Allahabad case referred above, it has been held that where there is a valid mortgage and a deposit is made in the Court by the mortgagor to redeem it, the Court is not bound to first pass a preliminary decree and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once. Learned counsel for the defendant tried to distinguish this decision. But there is no real distinction on facts between that case and this one. *Manicka Chetti* v. *Kuppusami Asari*[1] is a case where a decree was passed for redemption on compromise between the parties. It has been pointed out that it is not absolutely necessary that in every mortgage suit, there should be a preliminary decree before a final decree is passed.

10. I have already indicated the facts and circumstances of this case to show that there is nothing wrong in the trial Court straightaway passing a decree for redemption. The direction given by the first appellate Court regarding the ascertainment of mesne profits by separate enquiry is correct. The second appeal fails and is accordingly dismissed with costs.

R.S. *Appeal allowed.*

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1. A.I.R. 1926 Mad. 644.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

Alvel Sales .. *Appellant**

v.

Dujodwala Industries .. *Respondent.*

(A) *Arbitration Act* (*X of* 1940), *section* 14 (2)—*Form of notice—Arbitration agreement—One party naming an arbitrator—Failure by other party to name—Arbitrator named becoming sole arbitrator—Notice of date of enquiry given—One of the parties not taking part in the enquiry—Award passed by arbitrator—Notice of award to parties—Petition by arbitrator to Court for reception of award—Notice sent by Court to the parties—Service of notice on representative of the party—Service of notice whether proper and valid—Aggrieved party not taking any action—Decree in terms of award—Execution of the decree—Petition to set aside the* ex parte *decree—Maintainability.*

(B) *Civil Procedure Code* (*V of* 1908), *section* 142, *Order* 1, *rule* 5—*Applicability to Arbitration Act.*

Under section 41 of the Arbitration Act, there is a general miscellaneous provision enabling the adoption of the provisions of the Code of Civil Procedure, 1908, to all proceedings arising under the Arbitration Act. The same is subject to the provisions of the Act. Caution therefore is required against mechanically adopting or invoking the procedural provisions of the Code of Civil Procedure, when dealing with substantive provisions under the Arbitration Act. This intention is clear from a comparison of certain relevant provisions of the Code of Civil Procedure and the Arbitration Act and the interpretation given to them by the highest Court of the land. Section 142 of the Code of Civil Procedure, expressly lays down

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* O.S.No.6 of 1975. 29th June, 1977.

a mandate that all orders and notices served on or given to any person under the provisions of the Code shall be in writing. The Supreme Court however while interpreting the word 'notice' in section 14 (2) of the Arbitration Act, has expresed itself very clearly that such a notice need not be in writing. In fact, it said that an oral notice to the parties concerned would be a substitute and could be validly acted upon.

[*Para*. 11.]

Order 3 of the Civil Procedure Code, is a special procedure in the Code touching upon the manner and method by which Courts should recognise agents and pleaders. If no such norm is prescribed or a mandate set for the Courts to act and accept agents of parties, it is likely to lead to confusion. Therefore it was that the Procedure Code, thought of prescribing certain conditions by which the Courts should recognise agents and provided in Order 3, rule 6, that such agents who are to be recognised as 'agents' within the meaning of Order 3 should be persons who have a special or general authority in writing from the principals concerned. This is not the apposite rule for consideration at all and particularly in the light of the observations made by the Supreme Court.

[*Para*. 12.]

Held, that the decree in the present case was not an *ex parte* decree. It was a decree which the Court is bound to pass under section 17 of the Arbitration Act.

Cases referred to:—

Nilkantha v. *Kashinath*, A.I.R. 1962 S.C. 666; *Roshan Lal* v. *Firm Bridhi Chand*, A.I.R. 1924 Pat. 603; *Rajeshwar Pd.* v. *Ambika Pd.*, A.I.R. 1956 Pat 28; *Ramchander* v. *Jamna Shankar*, A.I.R. 1962 Raj. 12.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Honourable Mr. Justice Paul, dated 6th February, 1973 and passed in the exercise of the ordinary Original Civil Jurisdiction of this Court in Application No. 2703 of 1972 in O.P. No. 195 of 1971.

R. Krishnamurthy, A. R. Lakshmanan and *K. A. Basheer Ahmed,* for Appellant.

V. R. Gopalan, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—In connection with certain disputes which arose between the appellant and the respondent, one Mr. V. Venkataraman was appointed as Arbitrator by the appellant in the first instance and as per clause (21) of the arbitration agreement the respondent was called upon to nominate its arbitrator. On the failure of the respondent to do so, Mr. V. Venkataraman, in accordance with law, became the sole Arbitrator and he entered upon the reference as per the arbitration agreement in or about August, 1970. We are not, in this appeal, quoting the arbitration agreement, or the nature of the dispute between the parties, as it is not necessary.

2. The sole Arbitrator Mr. V. Venkataraman gave notice of his having assumed office, to both the parties and asked them to attend the enquiry on a date fixed by him in August, 1970. The respondent was not prepared to participate in the enquiry and wanted the Arbitrator not to proceed with the enquiry. Inspite of it, the Arbitrator who was entitled to proceed with the enquiry in terms of his appointment, intended to hear the parties and fixed the 12th of September, 1970, as the date of hearing of the contentions of the parties on the disputes raised. It appears that the then counsel, whom we characterise as the general counsel, appearing for the respondent, telephoned the Arbitrator and wanted time. Thereafter, the same counsel said that he did not want to participate in the arbitration enquiry as it would prejudice him.

3. By that time, a civil suit, C.S. No. 75 of 1970 was pending between the parties. In that suit, the relief prayed

was for a direction to the respondent to produce the arbitration agreement into Court for purposes of appointing an Arbitrator through the intervention of Court. As the said proceeding was by then pending, the sole Arbitrator Mr. V. Venkataraman who was appointed at the instance of the appellant in the circumstances already stated, filed an application for extension of time for passing of the award. In the view that an Arbitrator had already been appointed, suit C.S. No. 75 of 1970 was withdrawn. The position, therefore, early in 1971, was that the respondent did not participate in the enquiry started by the Arbitrator. In those circumstances, the Arbitrator passed his award on the 9th of March, 1971 and, admittedly gave notice of such passing of the award to both the parties, which was received by the respondent thereafter. At this stage, therefore, it is obvious that the respondent had notice of the passing of the award by the Arbitrator. Duty-bound, as he was in law, the Arbitrator filed O.P.No. 195 of 1971, that being a petition under section 14 (2) of the Arbitration Act for reception of the award and for further proceedings.

4. It is common ground that the said O.P. No. 195 of 1971 filed by the Arbitrator was taken on file, and Ganesan, J., issued notice to all parties concerned. This notice, according to the appellant, was served through the office of the Sheriff of the High Court on one of the representatives of the respondent-firm, which by then, opened a branch office in Madras. We shall, of course, refer to this aspect in full at a later stage. It is common ground, however, that one Nandalal Agarwal working in the Madras Branch of the respondent-firm, received the said notice, affixed the seal of the company and thus received the Court notice issued under section 14 (2). As such notices are only intended as step-in-aid for either party to process its grievances, one party for obtaining a decree in terms of the award, and the aggrieved party for setting aside or modifying the award in accordance with the provisions of the Arbitration Act, the appellant discreetly waited for the passage of time and never took any steps till he came to Court in Application No. 1043 of 1972 in O. P. No. 195 of 1971 for passing a judgment in terms of the award of Mr. V. Venkataraman, dated the 9th of March, 1971.

5. A decree in terms of the award was passed by Gokulakrishnan, J., on 22nd June, 1972 in Application No. 1043 of 1972. Thereafter, the appellant filed an execution petition to obtain his remedy under the decree as above and even sought for the issue of a precept in Application No. 2541 of 1972 to a Court in Bombay. Thereafter, the respondent, pleading that it had knowledge of the passing of the decree only in November, 1972, filed Application Nos. 2703 and 2704 of 1972 seeking for orders from this Court to set aside the so-called *ex parte* decree passed by this Court in Application No. 1043 of 1972 and for re-opening the entire matter to enable it to place its objections as against the award passed by the Arbitrator. The Judge's summons in application No. 2703 of 1972 was to the effect that the "*ex parte*" decree dated the 22nd of June, 1972 should be set aside. In the other application, *viz.*, Application No. 2704 of 1972, the respondent sought for stay of execution of the decree and further processing of the same.

6. In the affidavit filed in support of the application for setting aside the so-called *ex parte* decree, the allegation was that the Court, while issuing notice in O.P. No. 195 of 1971, did not issue the same to the Bombay address of the respondent-firm as was usual on prior occasions when the Arbitrator was corresponding with the parties, but such a notice under section 14 (2) was sought to be served on a clerk of the respondent-firm then set up in Madras and that the said clerk had no authority to receive the said notice issued by the Court. The respondent would add that it came to know about the passing of the *ex parte* decree only in November, 1972, and in those circumstances, sought for the setting aside of the *ex parte* decree. The prayer in the other application was, as already noticed, only

consequential to that asked for in Application No. 2703 of 1972.

7. In the counter-affidavit, the appellant specifically brought to the notice of the respondent that the notice in O.P. No. 195 of 1971 was acknowledged by one Nandalal Agarwal, describing himself as Assistant Manager of the respondent-company working in Madras and that he had the requisite authority to receive the same and he was also directed to do so by the manager of the office.

8. A reply affidavit was filed to this counter-affidavit. Here again, the respondent did not say that Agarwala did not bring the matter of such service of a Court notice regarding the filing of an award into Court to the notice of the local Manager, or of the Bombay Office but would spin up the matter by reiterating that Agarwala was not competent to receive any notice on behalf of the respondent and no one in the Madras Office was authorised to represent the company.

9. The matter came up before Paul, J. The learned Judge was of the view that it was an "*ex parte*" decree as is ordinarily understood in legal parlance, and that in the absence of such notice, knowledge, information or intelligence of the proceedings in Court, on the part of the respondent herein, it would not be fair to sustain the *ex parte* decree under which the appellant should be allowed to work out its rights. In those circumstances the learned Judge set aside the decree passed on the basis of the award, viewing it as an '*ex parte*' decree. It is against this decision, the present appeal has been filed.

10. The two questions that arise for consideration in this appeal are:

Firstly, whether the service of notice issued by the Court under section 14 (2) of the Arbitration Act is sufficient notice to the parties concerned and whether there is any void in either the processing of such service or the effecting of such service.

Secondly, whether the respondent can agitate in this Court, in the manner it has attempted to do, on the foot that there was no notice to it under section 14 (2) and that the service on Agarwala was without warrant and whether in those circumstances it could consider it as an *ex parte* decree and avoid the same in a manner ordinarily known to common law.

11. Though under section 41 of the Arbitration Act, there is a general miscellaneous provision enabling the adoption of the provisions of the Code of Civil Procedure of 1908 to all proceedings arising under the Arbitration Act, yet the same is subject to the provisions of that Act. Caution, therefore, is required while mechanically adapting or invoking the procedural provisions of the Code of Civil Procedure, 1908, when dealing with substantive provisions under the Arbitration Act. That this is the intention is clear from a comparison of certain relevant provisions of the Code of Civil Procedure and the Arbitration Act and the interpretation given to them by the highest Court of the land. We are here concerned with service of notices, and not with reference to service of summons. Section 142 of the Code of Civil Procedure, expressly lays down a mandate that all orders and notices served on or given to any person under the provisions of the Code shall be in writing. The Supreme Court, however, while interpreting the word 'notice' appearing in section 14 (2) of the Arbitration Act, have expressed themselves very clearly that such a notice need not be in writing. In fact, they said that an oral notice to the parties concerned would be a substitute and could be validly acted upon. In fact, the ratio of the decision of the Supreme Court reported in *Nilkantha* v. *Kashinath*[1] categorically gives the impression that such notice as is required under sub-section (2) of section 14 of the Arbitration Act need not necessarily mean communication in writing, but, on the other hand, the learned Judges were of the view that if in a given case there is proof of intimation or the gaining of intelligence of the administration of a warning by the Court to the party concerned, that an award has come to Court and that it was filed by the Arbitrator as required under section 14 (1) of the Act, then, the Supreme Court is of the view that such a

1. A.I.R. 1962 S.C. 666.

notice is a valid notice. In that case the Supreme Court, observed as follows:

> "Sub-section (1) of section 14 of the Arbitration Act (X of 1940) requires the arbitrators or umpire to give notice in writing to the parties of the making and signing of the award. Sub-section (2) of that section requires the Court after the filing of the award, to give notice to the parties of the filing of the award. The difference in the provisions of the two sub-sections with respect to the giving of notice is significant and indicates clearly that the notice which the Court is to give to the parties of the filing of the award need not be a notice in writing. The notice can be given orally. No question of the service of the notice in the formal way of delivering the notice or tendering it to the party can arise in the case of a notice given orally. The communication of the information that an award has been filed is sufficient compliance with the requirements of sub-section (2) of section 14 with respect to the giving of the notice to the parties concerned about the filing of the award. 'Notice' does not necessarily mean 'communication in writing'. 'Notice' according to the Oxford Concise Dictionary, means 'intimation, intelligence, warning' and has this meaning in expressions like 'give notice, have notice' and it also means 'formal intimation of something, or instructions to do something' and has such a meaning in expressions like 'notice to quit, till further notice'. We are of opinion that the expression 'give notice' in sub-section (2) of section 14, simply means giving intimation of the filing of the award, which certainly was given to the parties through their pleaders on 21st February, 1948. Notice to the pleader is notice to the party, in view of rule 5 of Order 3, Civil Procedure Code, which provides that, any process served on the pleader of any pleader shall be presumed to be duly communicated and made known to the party whom the pleader represents and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person".

No doubt, in that case, the Supreme Court was considering whether a notice to the pleader was notice to the party. They held it was, and added that it was so, in view of rule 5 of Order 3 of the Code of Civil Procedure.

12. Taking advantage of this observation of the Supreme Court, a contention is sought to be made by Mr. Shanmugam that in the instant case even if Agarwala is to be regarded as an authorised representative or an agent such a service should be in the manner provided for in the Civil Procedure Code. Here again, we have to point out that Order 3 is a special procedure in the Code touching upon the manner and method by which Courts should recognise agents and pleaders. If no such norm is prescribed or a mandate set for the Courts to act and accept agents of parties, it is likely to lead to confusion. Therefore, it was the Procedural Code thought of prescribing certain conditions by which the Courts should recognise agents and provided in Order 3, rule 6, that such agents who are to be recognized as "agents" within the meaning of Order 3 should be persons who have a special or a general authority in writing from the principals concerned. This is not the apposite rule for consideration at all and particularly in the light of the observations made by the Supreme Court as above, that a notice under section 14 (2) of the Aribitration Act need not be in writing. Obviously, the Supreme Court, conscious of the difference between the provisions in the Code of Civil Procedure and the Arbitration Act, made a departure in the matter of the understanding of the words 'service of notice' contemplated in section 14 (2) of the Arbitration Act and observed and it need not be in writing and it would suffice if an intimation or an intelligence or a warning is given to the party concerned about the bringing of the award into the Court.

13. In the light of the discussion, as above, it is for us to consider whether the service on Agarwala should be deem-

ed to be valid service in the circumstances of the case. We have referred to the pleadings. The respondent would allege in the affidavit in support of the application to set aside the so called *ex parte* decree that no one had any authority to receive the notices from Court; when the respondent was confronted with a specific allegation in the counter-affidavit that the notice under section 14 (2) of the Arbitration Act was served on Agarwala who represented himself as Assistant Manager and has affixed the seal of the firm to the copy of the notice served by the bailiff of this Court on him, even then, the respondent would barely reiterate that Agarwala did not have the requisite authority to receive the notice. The respondent would not even state at that critical stage that Agarwala did not pass on the information of such service to it. As we felt a doubt whether the words Assistant Manager appearing in the docket proved such service of notice on Agarwala who was admittedly functioning in the Madras Office of the respondent firm we thought fit to examine him as a Court witness.

14. Mr. Agarwala gave evidence today before us. He is a Graduate and obviously therefore is well-acquainted with commercial practice. According to him, Mr. Gupta who was the Manager of the firm was not present in the office on the date when the bailiff sought to serve the notice on the respondent-firm on 15th September, 1971. Not only Mr. Agarwala admits that he received the notice, he also says that he has affixed the seal of the firm. But he would say that the seal was openly available to anybody in the firm. We do not believe him in this respect. Being an educated person entrusted with the administration of the office during the absence of the Manager, the elementary duty of his was to see that the seal of the office was not misused or lightly used by anyone functioning therein. Apart from this, he would say that he received the notice, mislaid it and never informed his employer about it. Here again we are unable to believe this witness. That this witness is speaking falsehood is clear from the fact that even in the reply affidavit filed by the respondent-firm, it would not allege that Mr. Nandalal Agarwala did not inform it about the service of notice under section 14 (2). We hold that Nandalal Agarwala received the notice as a person who had implied authority to act for the respondent-firm functioning in Madras and that in the peculiar circumstances he ought to have conveyed the information of such service to the respondent-firm.

15. This is what is required under the rule laid down by the Supreme Court. What is necessary is that the person aggrieved, who can be either party to the arbitration dispute should have the intelligence or a warning or information about the filing of the award. In the circumstances stated, and as we hold that service on Nandalal Agarwala has been effected and it should be deemed to be service on the Madras branch of the respondent-firm, we have no hesitation to hold that he should have passed on that information either to his manager soon after his return, or to the head-office at Bombay immediately thereafter.

16. The plea is that even though such service was effected on 15th September, 1971, the respondent-firm came to know about it only in November, 1972. Under Article 119 of the Limitation Act, 1963, a period of thirty days is provided for setting aside an award or getting an award remitted for re-consideration, from the date of service of the notice of the filing of the award. The date of service of the notice of the filing of the award is 15th September, 1971 as it was served on Agarwala who was functioning on behalf of the respondent-company at Madras. The reasonable impression which we gain on a perusal of the pleadings and particularly after hearing the Court-witness Agarwala, is that he should have informed the respondent within a reasonable time after 15th September, 1971. The respondent-company obviously lost its right and entitlement to have the award set aside in a manner known to law and as prescribed under the Limitation Act.

17. On the other hand, the appellant, after having been satisfied that no appli-

cation was filed by the other party either for modification or correction of the Award within the meaning of section 15, for remittance of the Award within the meaning of section 16 of the Arbitration Act, filed the application, Application No. 1043 of 1972 for passing a decree in terms of the Award in O.P. No. 195 of 1972. This application was ordered by Gokulakrishnan, J., and a decree in terms of the award was passed on 22nd June, 1972, Rightly in the Judge's summons taken out by the appellant, notice was not intended to be served on anyone. Mr. Shanmugam, learned counsel for the respondent, fairly concedes that no notice is required on that application, because it is the duty of the aggrieved party to take steps as per the provisions of the Arbitration Act read with the Limitation Act within the time provided; the applicant who seeks relief under the award in the shape of a decree in terms thereof need only wait to see whether this process would in any way be interdicted by the other party filing an application to set aside the award in a manner known to law or to cause a remittance of the same as provided under the Act. Therefore, we are satisfied that no notice was called for in Application No. 1043 of 1972 and it was in those circumstances the learned Judge passed the decree. The question is whether this is an *ex parte* decree.

18. We could do no better than quote the expressive language used by a Division Bench of the Patna High Court reported in *Roshan Lal* v. *Firm Bridhi Chand*[1], which principle was followed in a later decision reported in *Rajeshwar Pd.* v. *Ambika Pd.*[2] and *Ram Chander* v. *Jamna Shankar*[3]. In the words of the learned Judges:

> "The second point is equally clear. It is asserted by the appellants that as they had no opportunity to place their case before the Court the decree must be regarded as *ex parte*; but it is nothing of the sort. An *ex parte* decree is a decree passed by the Court in the absence of the defendants where the plaintiff has proved his case; but here the presence of the parties was not necessary to enable the Court to pronounce judgment according to the award".

We respectfully agree with these observations and hold that the decree in the case on hand is not *ex parte* decree at all. This is a decree which the Court is bound to pass under section 17 of the Arbitration Act, which appears to be rather mandatory in scope. Section 17 of the Arbitration Act says:—

> "Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow".

It, therefore, appears to us that there is no scope for the contention that this is a case in which an *ex parte* decree ought to be set aside. Even otherwise, the respondent had lost its rights to seek for the setting aside the award, as under the Limitation Act the period had expired and we are unable to believe without any further evidence, that it was only in November, 1972 that the respondent had knowledge of the passing of the award and the same having been brought into Court at the instance of the Arbitrator.

19. For all the reasons stated above, we are unable to agree with Paul, J. The Original Side appeal is allowed. There will, however, be no order as to costs. The appellant is at liberty to take further steps to execute the decree obtained by it in Application No. 1043 of 1972.

R.S. —— *Appeal allowed.*

1. A.I.R. 1924 Pat. 603.
2. A.I.R. 1956 Pat. 28.
3. A.I.R. 1962 Raj. 12.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao* and *S. Suryamurthi, JJ.*

M/s. India Automobiles and Co. and others .. *Appellants**

v.

Life Insurance Corporation of India, carrying on business at L.I.C. Building, Madras-2 .. *Respondent.*

India Automobiles Company carrying on business No. 3/18-C, Mount Road, Madras-2 .. *Appellant*

v.

Life Insurance Corporation of India, carrying on business at L.I.C. Buildings, Madras-2 .. *Respondent.*

Life Insurance Corporation of India .. *Plaintiff*

v.

M/s India Automobiles & Co. and others .. *Defendants.*

and

India Automobiles Company, Madras-2 .. *Plaintiff*

v.

Life Insurance Corporation of India, L.I.C. Buildings, Mount Road, Madras-2 .. *Defendant*

Co-owners—Lease by joint owners in favour of one among them—Validity—Suit for arrears of rent—Claim of interest at 12 per cent. per annum—Whether can be allowed—No express or implied contract—Lessor entitled to only 6 per cent. per annum.

There is no provision in the Transfer of Property Act or for that matter under the well known principles in common law which prevents joint owners of property from leasing out the same to one amongst themselves. [*Para.* 6.]

Where the plaintiff filed a suit for recovery of a sum of Rs. 59,026 towards rent and the suit was decreed with interest thereon at 12 per cent. per annum from the date it became due,

Held: There was no justification for the grant of interest at 12 per cent. per annum. There was no contract or implied understanding to pay such interest. The decree should be modified and the defendants directed to pay to the plaintiff a sum of Rs. 59,026.26 together with interest thereon at 6 per cent. per annum from the date of plaint to the date of payment. [*Para.* 12.]

Cases referred to:

Girindra Chandra Pal Chowdhuri and others v. *Sree Nath Pal Chowdhuri & others* (1906) 5 Cal.L.J. 141; *Rue* v. *Rue*, (1962) A.C. 496; *Rajammal* v. *The Chief Judge of Court of Small Causes*, (1949) 2 M.L.J. 555; 62 L.W. 750 : A.I.R. 1950 Mad. 185: *Hari Ramjee Gore Sastri* v. *The Malabar District Board*, (1950) 2 M.L.J. 810: A.I.R. 1951 Mad. 493.

Appeals under Clause 15 of the Letters Patent against the Judgments and decrees of the Honourable Mr. Justice N.S. Ramaswami, dated 23rd October, 1972 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C.S. Nos. 54 of 1969 and 87 of 1972 respectively.

G. Ramaswami, for *G. Jagadisa Iyer*, fo Appellants in both the Appeals.

S.K.L. Ratan, for Respondent in both the Appeals.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—These appeals are against the judgment of N.S.Ramaswami, J. Two suits were tried by him together and he rendered a common judgment thereon. No oral evidence was let in but documentary evidence was entertained and marked in one of the suits. The parties are referred to with reference to their rank and description in C.S. No. 54 of 1969. C.S. No. 54 of 1969 is a suit filed by the Life Insurance Corporation of India against the defendants, the first defendant of which is M/s. India

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*O.S.A. Nos. 62 and 63 of 1973; C.S. No. 54 of 1969 and C.S. No. 87 of 1972.

17*th June*, 1977.

Automobiles & Co., and defendants 2 to 6 being its partners, the respondents herein, for recovery of arrears of rent as their tenants. C.S. No. 87 of 1972 is a suit filed by the first defendant in C. S. No. 54 of 1969 (India Automobiles Co.) against the Life Insurance Corporation of India for a declaration that they are entitled to the benefits under the provisions of the City Tenants Protection Act in respect of one of the demised items. Seven co-owners owned a large extent of land in Mount Road. The entire property bore Municipal Door Nos. 2/18 and 3/18, Mount Road, Madras. The second defendant is the senior partner of the first defendant. He along with six others owned the vast extent of land in Mount Road. Different portions of the suit land were leased out to different persons. One such portion of land measuring about 4 grounds 151 sq.ft. carved out of the totality of the land was leased by the seven co-owners in favour of one co-owner, the second defendant herein under Exhibit P-1 dated 22nd September, 1947 who was by then the sole proprietor of the India Automobiles. This firm later on, became a partnership with defendants 2 to 6 as partners therein. It is common ground that the second defendant was in possession of the land demised under Exhibit P-1 long prior to the lease and he has erected superstructures of his own on the said land. Under another lease deed Exhibit P-2 the same co-owners including the second defendant let out 8700 sq. ft. of land together with a superstructure thereon to the second defendant who was also a co-owner thereto and defendants 1 to 6 are in possession of such demised land and superstructure under Exhibit P-2 dated 3rd October, 1947. Under Exhibit P-1, the defendants after they became partners along with the second defendant were to pay a monthly rent of Rs. 150 for the lease of the vacant land of an extent of four grounds 151 sq.ft. and similarly under Exhibit P-2 the defendants obliged to pay themselves rent for the land and superstructure at Rs. 200 per month. The learned Judge himself has noted that it is common ground that the subject-matter of the lease under Exhibit P-1 was only a vacant site and that under Exhibit P-2 was a site and superstructures. Several years thereafter, all the co-owners including the second defendant sold under Exhibit P-2 dated 30th July, 1953 the premises bearing municipal door Nos. 2/18 and 3/18, Mount Road, to the New Guardian of India Life Insurance Company Limited and the Official Trustee of Madras, who were predecessors-in-interest of the Life Insurance Corporation of India. The case of the Life Insurance Corporation of India herein after referred to as the respondents, is that by such purchase under Exhibit P-3 they have become the owners of not only the vacant land conveyed therein but also the superstructures standing on it which were by then in the occupation of the defendants. It is not in dispute that after the purchase, the Insurance Company recognised the defendants as their tenants of the respective portions in their occupation and as deleniated in Exhibits P-1 and P-2 and were collecting rents from them. The defendants who were entitled to a renewal of the lease, made a written demand for such a recognition of their status and in the documents filed it is seen that a draft lease deed was also prepared at one stage which was intended to further the interests of the defendants.

2. More than a decade after such consistent establishment of the jural relationship of landlord and tenant as between the Life Insurance Corporation of India, and the defendants, the Corporation filed an application for fixation of fair rent as regards the demise under Exhibits P-1 and P-2 and also contemporaneously filed an application for eviction of the defendants under the Madras Buildings (Lease and Rent Control) Act. The defendant's case was that the subject-matter of the lease was only a vacant site and the superstructure thereon always belonged to them and that, therefore, the Buildings Act would not apply at all. The Corporation was not successful before the Rent Controller. On appeal, a finding was called for regarding the ownership of the super-

structure and ultimately the appellate Court held that the superstructures belonged to the Corporation. In so doing, the appellate authority fixed the fair rent in respect of item X in Schedule A to the plaint at Rs. 994 per mensem this item being the subject-matter of the demise under Exhibit P-1 and fixed the fair rent for item 2 in Schedule A to the plaint at Rs. 1,451 per mensem, this item being referable to 8700 sq.ft. plus the superstructure leased out under Exhibit P-2. The present suit C.S. No. 54 of 1962 is a suit filed by the Corporation for arrears of rent in respect of the occupation of their property by the defendants and covered by leases Exhibits P-1 and P-2. In this suit a sum of Rs. 39,294.71 is claimed as the arrears of lease in respect of item I of plaint Schedule A and another sum of Rs. 59,026.02 as arrears in respect of item No. 2 of the A Schedule. Obviously the difference between the fair rent as fixed and the contract rent was the subject-matter of the claim in this suit. In so far as item 2 in Schedule A to the plaint is concerned there is no dispute in these proceedings because this was the subject-matter of the lease under Exhibit P-2 and the demise itself was referable to both the lands and the superstructure. The right of the Corporation to claim the difference between the fair rent and the contract rent is not disputed before us. The only dispute raised is as to the date from when such a claim could be projected. As regards item I of the plaint A Schedule, the defendants' contention is that at all material times the superstructure belonged to them and the demise was only of the vacant land and that therefore, the Madras Buildings (Lease and Rent Control) Act, can have no application to such a demise and that fair rent cannot be fixed by a statutory Tribunal functioning under that Act and that the claim based on such fair rent is unsustainable. The learned Judge, who recast the issues, set the following issues for trial before him:

1. Whether the Rent Controller had no jurisdiction to fix the fair rent in respect of the property covered by the lease dated 22nd September, 1947 (*i.e.*, Item No. I of Schedule A to the plaint)?

2. Whether the fixation of fair rent in respect of item No. 1 property is incompetent and not valid and binding on defendants and is of no legal effect?

3. Whether the plaintiff is the owner of the superstructures put up by the defendants on item No. 1 of Schedule A to the plaint?

4. Are the defendants not liable to pay the sum of Rs. 39,224.71 claimed for fair rent in respect of the No. 1 property?

5. Are the defendants liable to pay the fair rent from the date of the petition as claimed in the plaint in respect of both the items?

6. Are the defendants liable to pay the entire amount claimed as fair rent in respect of item No. 2?

7. To what relief the parties are entitled?

3. In the other suit C.S. No. 87 of 1972, the defendants as plaintiffs therein seek for a declaration that what was leased under Exhibit P-1 was only a vacant land and that the superstructure belongs to them and that, therefore, they are entitled to protection under the Madras City Tenant Protection Act. The decision in this suit would mainly depend upon the finding on the issue as to what was the subject matter of the lease under Exhibit P-1. It is now common ground that if the subject-matter of the demise under Exhibit P-1 was only a vacant land, then the defendants would not be entitled to a declaration as prayed for by them in C.S. No. 87 of 1972, since such rights could be projected only in a suit for ejectment filed by the landlords; that is not the case here.

4. Thus the only question which came up for decision before the learned Judge and which is the subject-matter of these appeals is, whether the defendants who are the appellants before us, are the owners of the superstructures over the land (item I of Schedule A) covered by the demise under Exhibit P-1. If it is found that the defendants are the owners of such superstructure, then it follows that the Rent Controller would have no jurisdiction to fix the fair rent and to that extent, therefore, the Cor-

poration would not be entitled to a money decree for the alleged arrears of rent based on the fair rent fixed under the Rent Act. If, however, it is found that the superstructures were also purchased by the Corporation and therefore, were not the property of the defendants, then the defendants should suffer the money decree as prayed for by the plaintiff.

5. We shall first dispose of the legal contention that is raised in this case that the co-owners of property cannot lease either the whole or part of such property owned by them to one amongst themselves and that, therefore, Exhibits P-1 and P-2 are void and unenforceable leases and there was no transfer of interest either in favour of the second defendant in the first instance or later, such interest was not acquired by defendants as partners of India Automobiles. Strong reliance was placed upon the decision in *Girindra Chandra Pal Chowdhuri and others* v. *Sree Nath Pal Chowdhuri and others*[1], and a decision of the House of Lords referred to in Mulla's Transfer of Property Act (V Edition, page 638). We may at once state that the question which arose before the House of Lords in the above case was whether a person can grant a lease to himself. While negativing that contention the learned law lords hold that the law does not enable a person to grant himself a lease of land of which he is the owner. Lord Denning, who also gave a concurrent judgment, made certain observations which are apposite in the present case. We shall extract them as it would be convenient and better to do so. In *Rue v. Rue*[2], which is the case relied upon, Lord Denning observed as follows:

> "Has the Law of Property Act, 1925 changed all this? It has certainly changed it where two persons grant a tenancy by writing to one of themselves, as where *A* and *B* grant a yearly tenancy to *B*; and *B* enters into covenants with *A* and *B* to repair, and so forth. Such a tenancy is valid under section 72 (4) because it is a "conveyance"; and the covenants are enforceable under section 82 (1) just as if *B* had covenanted with *A* alone. Notice to quit can be given by *A* to *B* or *B* to *A*. So no difficulty arises.
>
> But what is the position when a person grants a tenancy by writing to himself (*A* lets to *A*) or two persons grant it to themselves (*A* and *B* let to *A* and *B*); and there are the usual express or implied covenants (*A* covenant with *A* or, *A* and *B* jointly covenant with *A* and *B* jointly)? such a tenancy does not come within section 72 (4); nor do the covenants come within section 82 (1) because both those sub-sections as I read them, only apply where one of the persons at any rate is not on both sides."

6. On the basis of the rule in *Rue* v. *Rue*[1], the learned Judge thought that Exhibits P-1 and P-2 are unenforceable. But if we analyse the ratio of that decision, it is seen that if the parties to the document are not the same and if *A* and *B* are the lessers and *A* is the lessee, such a lease is possible and the covenants therein are enforceable. Even the decision in *Girindra Chandra Pal Chowduri* v. *Sree Nath Pal Chowduri*[2], is distinguishable. That was a case where it was found that there was no relationship of landlord and tenant at all between the parties and in that context the claim for recovery of rent by the so-called landlord was negatived. The principle laid down by Lord Denning in *Rue* v. *Rue*[1], is accepted by well-known authors. In Hill and Redman's Law of Landlord and Tenant—15th Edition, page 633, the above House of Lords case is quoted for the proposition that two or more persons can assign to one or more of themselves; but the number of assignees must be at least one less than the number of assignors. Woodfall on Landlord and Tenant, 27th Edition, page 61 refers to *Rue* v. *Rue*[1], as authority for the proposition that joint tenants cannot grant a lease to themselves. We do not find any provision in the Transfer

1. (1906) 3 Cal. L.J. 141.
2. (1962) A.C. 496 at p. 513.

1. (1962) A.C. 496.
2. (1906) 3 Cal.L.J. 141.

of Property Act or for the matter of that under the well-known principles in common law which prevents joint owners of property from leasing out the same to one amongst themselves. We hold, therefore, that Exhibits P-1 and P-2 are valid leases and the relationship between the defendants and the Corporation at all times was that of tenants and landlords.

7. That this jural relationship was correctly understood between the parties is also clear from the fact that the Corporation was regularly collecting the rents from the defendants. (sometimes from the second defendant when he was the proprietor of India Automobiles) and this again is demonstrative proof of the intention of parties that they recognised such a contractual relationship as between themselves. In fact, one of the documents disclosed in the course of trial is Exhibit P-9-a. That is a draft lease deed which was apparently exchanged between the parties (vide Exhibit P-8, P-10 and P-14). Here again the Corporation harped upon the jural relationship of lesser and lessee as between itself and the defendants and would also give credence to the renewal clause contained in Exhibits P-1 and P-2. In fact, the draft lease deed was prepared in pursuance of the exercise of that option to renew the lease by the lessees (defendants). We shall, of course consider Exhibit P-9-a further while deciding the question as to who is the owner of the superstructure in item I of Schedule A to the plaint. But for the purpose of the present discussion it appears to us to be clear that the conduct of the Corporation in collecting the rents and their attitude in having recognised the right in the defendants to obtain renewal of the lease as lessee, are all pointers to the conclusion that the parties always understood that one was the landlord and the other was the tenant in respect of the properties which were the subject-matter of the demise under Exhibits P-1 and P-2.

8. We, therefore, hold that there was a valid lease which the defendants could enforce as against the successors-in-interest of the quondam owners of the totality of the property and that in particular, Exhibits P-1 and P-2 are valid instruments.

9. The next question, therefore, is as to what was the subject-matter of the lease under Exhibit P-1. We have already seen that under Exhibit P-2 both land and the superstructure were leased.

10. In Exhibit P-1 land measuring 4 grounds 151 sq. ft. was leased out by the co-owners to one amongst themselves. Therein, it was made clear that the buildings or sheds on that portion of the vacant land which was demised under Exhibit P-1 was already put up by the second defendant when he was the proprietor of Indian Automobiles and that the said superstructures or buildings belonged to them. Even in the Schedule the description given is that 4 grounds and 151 sq. ft. vacant land were leased out and it was not covenanted that any superstructure thereon was the subject-matter of the lease. When the totality of the property from which the above 4 grounds and 151 sq. ft. was carved out and leased to the defendants was sold under Exhibit P-3 dated 30th July, 1953, the co-owners harped upon the fact that there were some tenants in the suit property, who have put up superstructures on the leased land, that those structures belonged to them. It was also made clear that some buildings which were the subject-matter of sale under Exhibit P-3 were those buildings which belonged to the vendors. There was a candid and clear reference to the fact that some of the tenants, who were occupying the portions of the land sold under Exhibit P-3 have erected independently buildings of their own and that they were selling to the Corporation or their predecessor their right under the respective leases with those tenants to acquire buildings erected by them. Dichotomy therefore was maintained throughout the recitals in Exhibit P-3 as between the buildings owned by the entirety of the co-owners and those structures belonging to the tenants (one such tenant was a co-owner), who were in occupation of the portions of the land, which were the subject-matter of the sale under Exhibit P-3. We have already expres-

sed the view that defendants 2 to 6 after they became partners of the first defendant and the second defendant as proprietor of India Automobiles put up structures on the leasehold land which they took on lease under Exhibit P-1 and at all material times these structures belonged to them. Having regard to the express recitals in Exhibit P-3 which made a distinct reference to the buildings owned by the tenants in occupation of the land which were conveyed under Exhibit P-3, it is impossible to come to the conclusion that the buildings which admittedly belonged to the defendants and constructed on the vacant land taken on lease by them under Exhibit P-1 was ever or could be the subject-matter of the sale under Exhibit P-3. In fact one of the recitals in Exhibit P-3 is that the co-owners have handed over to the Corporation or their predecessors the several lease deeds regarding the property conveyed. Obviously, one such lease deed is Exhibit P-1. This was acted upon by the Corporation as is seen from the admitted fact that they collected the rents from the defendants. They were even prepared to recognise the right vested in the defendants as lessees to renew the lease of the land only as per the terms of Exhibit P-1. This is clear from Exhibit P-9-a. Even in the Schedule to Exhibit P-3, emphasis was laid on the fact that what was sold was land together with the buildings belonging to the "vendors". It, therefore, follows that if the "superstructure" did not belong to the vendors then it did not pass under Exhibit P-3. It is nobody's case that the superstructures which were standing on the land and which were the subject-matter of the lease under Exhibit P-1 were ever the property of all the co-owners. In fact it is practically admitted that the superstructure or the buildings which were standing on the land which is the subject-matter of the demise under Exhibit P-1 was the property of the India Automobiles and thereafter the property of the defendants. What is however harped upon by the learned Judge is that there is no proof that the defendants paid property tax to the said superstructure belonging to them. This is a matter which does not arise strictly for consideration at all. If the defendants have avoided the payment of the property tax as per the provisions of the Madras Corporation Act, it is for the Corporation to take steps against them. Exhibits P-23 and P-24 no doubt would refer to the payment of property tax made by the Corporation by reason of their purchase of the land and the various other superstructures conveyed under Exhibit P-3. The mere exhibition of such receipts for payment of property tax cannot help the Corporation at all, nor would it be a document which can categorically be said to be against the interests of the defendants. There is abundant proof in this case to show that the defendants are the owners of the superstructures in question. It, therefore, follows that in so far as item I of A Schedule to the plaint is concerned, the superstructures always belonged to the appellants in O.S. Appeal No. 62 of 1973 and, that, therefore, the statutory functionaries under the Madras Buildings (Lease and Rent Control) Act did not have the jurisdiction to entertain an application for fixation of fair rent to a property which was only a vacant land. In consequence therefore, the Corporation (respondent in this appeal) cannot lay a suit for recovery of rent based on the order made by such statutory Tribunal under the Rent Act, and claim the difference between the so-called fair rent and the contract rent. The claim of the Corporation for recovery of Rs. 39,224.71 as arrears of rent in respect of item I of the plaint Schedule A properties is not recoverable and the appeal O.S.A. No. 62 of 1973 is, therefore, allowed to that extent.

11. The contention of the appellant that the order fixing fair rent takes effect from the date of the order is not sustainable. In *Rajammal* v. *The Chief Judge of Court of Small Causes*[1], a Division Bench of our Court presided over by Rajamannar, CJ., has made the position clear that such fair rent orders are effective from the date of application. The consistent view of our Court as is seen from the ratio in *Hari R mjee Gore Sastri* v. *The Malabar Dt. Board*,

1. (1949) 2 M.L.J. 555 : 62 L.W. 750 : A.I.R. 1950 Mad. 185.

Kozhikode[1], is to the same effect as stated above. We are unable to accept that the order fixing fair rent under the Madras Buildings (Lease and Rent Control) Act is effective only from the date of the order of the statutory Tribunal.

12. As regards item II of the plaint A Schedule property, there is no dispute at all. The claim was for recovery of a sum of Rs. 59,026 towards the rent for this item; the learned Judge decreed the suit as claimed but granted interest thereon at 12 per cent. per annum from the date when it became due. We do not find any justification for the grant of the interest at 12 per cent. per annum. There is no contract or implied understanding to pay such interest. We, therefore, modify the decree in so far as this item is concerned and direct the defendants to pay to the Corporation a sum of Rs. 59,026.26 together with interest thereon at 6 per cent. per annum from the date of plaint to the date of payment.

13. The appeal O.S.A. No. 62 of 1973 is partly allowed to the extent indicated above with proportionate costs.

14. In view of our above findings, on the main issues in both the suits, O.S.A. No. 63 of 1973 against C.S. No. 87 of 1972 is dismissed and there will be no order as to costs.

S.J.

O. S. A. No. 62 partly allowed; O. S. A. No. 63 dismissed.

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1. (1950) 2 M.L.J. 810 : A.I.R. 1951 Mad. 493.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT.—*A. D. Koshal, J.*

K. Kanagasabapathy .. *Petitioner**

v.

City Supply Officer, Civil Supplies Department, Madras-1 and others .. *Respondents.*

Madras Civil Services (Classification, Control and Appeal) Rules, rule 16—Petitioner, permanent staff of the Transport department deputed to Civil Supplies Department—Subsequent transfer to parent department—Borrowing department passing orders for recovery of shortages from petitioner relating to the period of his employment in the borrowing department—Borrowing department had no jurisdiction—Certiorari issued—Constitution of India (1950), *Article* 226.

Rule 16 (of the Madras Civil Supplies (Classification, Control and Appeal) Rules) gave the power of inflicting minor punishments to a borrowing department. But that power was available only so long as the concerned officer was serving in it and not after he had gone back to the parent department. This was clear from the direction contained in the rule that after completion of an enquiry in a case where the borrowing department considered that the punishment of compulsory retirement, removal or dismissal should be imposed, it should revert the person concerned to the lending authority. The question of reversion could only crop up if the concerned employee was still with the borrowing department. The rule, therefore, was of no help to a borrowing department after the reversion of the employee had already taken place, in which case the lending authority alone would be competent to inflict a punishment, whether it was of a major or a minor character, on such employee. [Para. 2.]

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* W.P. No. 3118 of 1972. 23rd February, 1977.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondents, namely (1) Deputy Commissioner of Civil Supplies in No. D-2 17314/66, dated 12th August, 1970 ; (2) City Supply Officer, Madras in R. No. H-8. 9662, dated 12th August, 1970 and R. No. H. 8. 9661/68 dated 6th May, 1971 ; and (3) Commissioner of Civil Supplies in proceedings K. Dis. 30718/72 dated 6th July, 1972 and quash the said orders and made therein and to direct the refund of the amount already recovered from the petitioner under the said order.

R. Kunchithapadam, for Petitioner.

G. Chinnasami, for Government Pleader on behalf of Respondents.

The Court made the following

ORDER.—The petitioner is a member of the permanent staff of the Transport Department of the Government of Tamil Nadu (hereinafter referred to as the parent department). In the year 1964, he was sent on a deputation to the Civil Supplies Department of the same Government (hereinafter referred to as the borrowing department) and worked therein till the year 1966 when he went back to the parent department. About a year and a half later, he was asked to explain certain matters in relation to the performance of his duties in the borrowing department during the period when he had worked there as manager of a ration depot. Ultimately, the matter culminated in an order dated 12th of August, 1970 passed by the Deputy Commissioner of Civil Supplies, Madras and holding the petitioner responsible for payment to the borrowing department of a sum of Rs. 776.39 and directing that the sum be recovered from him in fifteen monthly instalments, another order dated 30th of April, 1971 passed by the City Supply Officer, Madras and holding the petitioner responsible for shortages to the tune of Rs.173.11 and directing that the said amount be recovered from the petitioner in eleven instalments, and still another order dated the 6th of May, 1971 passed by the Officer last mentioned and holding the petitioner responsible for further shortages valued at Rs. 1,000.60 which the petitioner was directed to make good to the borrowing department in twenty instalments."

The petitioner filed before the Commissioner of Civil Supplies, Madras, an appeal against all the three orders abovementioned but the same was dismissed by an order dated the 6th of July, 1972 which, along with the three original orders is challenged by the petitioner under Article 226 of the Constitution of India with a prayer that they be quashed by a writ of *certiorari*.

2. The sole ground put forward in support of the petition is that after the petitioner had left the borrowing department and gone back to the parent department, the officers of the borrowing department had no jurisdiction to take any disciplinary proceedings against him. That an order directing recovery of any amounts on account of shortages etc., is one imposing a minor punishment on the concerned employee is admitted on all hands and it is the case of the borrowing department, which is represented before me by four of its officers, that rule 16 of the Madras Civil Services (Classification, Control and Appeal) Rules justifies disciplinary action against the petitioner by the borrowing department in so far as minor punishments such as recovery for shortages are concerned. The relevant part of that rule states :

"16. Where a person to be punished has been lent to the punishing authority :—

(*i*) the power to impose the penalty of compulsory retirement or removal or dismissal shall not lie with any authority other than the lending authority ; the borrowing authority shall in a case where it considers that the punishment of compulsory retirement, removal or dismissal should be imposed, complete the inquiry and revert the person concerned to the lending authority for such action as that authority may consider necessary."

The rule no doubt gives the power of inflicting minor punishments to a borrowing department. But then that power is made available to a borrowing department only so long as the concerned officer is serving in it and not after he has gone back to the parent department. This is made clear by the direction contained in the rule that after completion of an enquiry in a case where the borrowing department considers that the punishment of compulsory retirement, removal or dismissal should be imposed, it shall revert the person concerned to the lending authority. The question of reversion, can only crop up if the concerned employee is still with the borrowing department. The rule, therefore, is of no help to a borrowing department after the reversion of the employee has already taken place, in which case the lending authority alone would be competent to inflict, a punishment, whether it is of a major or a minor character, on such employee. In this view of the matter my finding is that the borrowing department had no jurisdiction to inflict the punishment of recovery of moneys on account of loss caused to it by the negligence or misconduct of the petitioner while he was working under the borrowing department.

3. In the result the petition succeeds and is accepted and the impugned orders are quashed as being without jurisdiction. Further the respondents are directed to refund to the petitioner any amount or amounts which may have been recovered from him under the said orders. The parties are, however, left to bear their own costs.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Ramaswami, J.*

E. Retnamma Pillai Thankachi — *Appellant**

v.

P. Kamalam Mudaliar and others *Respondents.*

Limitation Act (XXXVI of 1963,) section 20—Mortgage—Suit for redemption of—Mortgage dated 1865—Acknowledgment of mortgage by one of the mortgagees on 14th October, 1912—Whether saves limitation—Held in the negative.

A suit was filed for redemption of a mortgage of the year 1865. The plaintiff relied on an acknowledgment by one of the mortgagees made on 14th October, 1912.

Held: It was well-settled that an acknowledgment by one of the mortgagees would not give a fresh starting point of limitation. Therefore the plaintiff could not rely on the acknowledgment made by one of the mortgagees made on 14th October, 1912. [*Para.* 2.]

Cases referred to :

Vaikunta Bhakta v. *Kunni Pakki Beari*, (1909) 19 M.L.J. 288; *Bhogilal* v. *Amritlal*, (1893) I.L.R. 17 Bom. 173 ; *Dharma* v. *Balamukund*, (1896) I.L.R. 18 All. 458 ; *Mawasi Raji Ram* v. *Mt. Manbharai*, A.I.R. 1964 Punjab. 226.

Appeal against the decree of the Court of the Subordinate Judge, Nagercoil in Appeal Suit No. 304 of 1970, preferred against the decree of the Court of the Additional District Munsif of Kuzhithurai in Original Suit No. 512 of 1966.

P. Anandhakrishnan Nair, for Appellant.

S. Padmanabhan, for respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He filed a suit for redemption of the mortgage of the year 1865. He claimed that the suit was not barred by limitation on the

*S.A. No. 209 of 1974. *4th October*, 1976.

ground that there was an assignment of the mortgage to the predecessor-in-interest of the contesting respondents under Exhibit A-8 dated 2nd June, 1898 and a later purakkadom (subsequent charge) of the same year and also a subsequent acknowledgment by one of the mortgagees on 14th October, 1912.

2. The short point that arises for consideration is whether the acknowledgment by one of the mortgagees made on 14th October, 1912 will save the suit from the bar of limitation. It is well-settled that an acknowledgment by one of the mortgagees will not give a fresh starting point of limitation. As early as in *Vaikurta Bhakta* v. *Kunni Pakki Beari*[1], a Division Bench of this Court held following an earlier decision of the Bombay High Court in *Bhogilal* v. *Amritlal*[2], that an acknowledgment by one of the several heirs of the mortgagee of the mortgagor's right of redemption would not be sufficient to give a new starting point for limitation under section 1, clause 15, of Act XIV of 1859 corresponding to section 20 of the Limitation Act of 1963. In fact subsequent decisions of the Allahabad High Court in *Dharmo* v. *Balamukund*[3] and of the Punjab High Court in *Mawasi Raji Ram* v. *Mt. Manbharai*[4], have taken the same view. The learned counsel for the appellant was not able to rely on any other decision contra. Therefore the plaintiff could not rely on the acknowledgment by one of the mortgagees made on 14th October, 1912. It is not in dispute that if this acknowledgment would not start a new point of limitation the suit is barred by limitation.

3. The second appeal therefore fails and it is dismissed. But there will be no order as to costs. No leave.

S.J. —— *Appeal dismissed.*

1. (1909) 19 M.L.J. 288.
2. (1893) I.L.R. 17 Bom. 173.
3. (1896) I.L.R. 18 All. 458.
4. A.I.R. 1964 Punj. 226.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*M.M. Ismail, J.*

Balasubramaniam and another .. *Appellants**

v.

Purushothaman and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 15—Petition to sue in forma pauperis*—Dismissed for default—Subsequent suit filed and entertained—Scope of Order 33, rule 15—Suit maintainable so far as prior petition was not dismissed on merits.*

Order 33, rule 15, Civil Procedure Code, would be attracted only if the earlier petition was dismissed on merits. The word "refusing" occurring in that provision supports this inference. In view of the judgment in *Polepeddi Krishnamoorthy* v. *Polepeddi Ramayya*, (1927) I.L.R. 50 Mad. 63 : 51 M.L.J. 79, it was clear that Order 33, rule 15, Civil Procedure Code, applied only to a case where a prior application for permission to sue *in forma pauperis* was rejected on merits, and not to a case where the application was dismissed for default. [*Para.* 3.]

Cases referred to:—

Polepeddi Krishnamoorthy v. *Polepeddi Ramayya*, (1927) I.L.R. 50 Mad. 63 : 51 M.L.J. 79 : A.I.R. 1926 Mad. 875; *Chinnammal* v. *Papathi Ammal*, A.I.R. 1925 Mad. 986.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 508 of 1973, preferred against the decree of the Court of the District Munsif, Kallakurichi in Original Suit No. 97 of 1968.

K. Parasurama Ayyar, for Appellants.

K. Sarvabhauman and *R. Nandakumar*, for Respondents.

*S.A. No. 2172 of 1974.

18th March, 1977.

The Court delivered the following

JUDGMENT.—Defendants 3 and 5 who are the legal representatives of the first defendant in O.S. No. 97 of 1968, on the file of the Court of the District Munsif of Kallakurichi, who lost before the Courts below, are the appellants herein. Respondents 1 and 2, the plaintiffs, instituted the suit for declaration of title to, and recovery of possession of, the suit properties after setting side two sale deeds dated 25th April, 1955 marked as Exhibit B-3 and 4th August, 1959 marked as Exhibit B-4, executed by the second defendant, mother of the plaintiffs, on her own behalf and as guardian of the plaintiffs, in favour of the first defendant. There is no dispute about the fact that the properties were settled on the second defendant and the plaintiffs. Equally there is no dispute about the fact that the second defendant executed the two sale deeds Exhibit B-3 for a consideration of Rs. 600 and Exhibit B-4 for a consideration of Rs. 1,800, purporting to act on her behalf as well as on behalf of her minor children. The suit was instituted for cancelling these two sale deeds and for recovering possession of the properties on the ground that the sale deeds were not binding on the minors. Both the Courts below found that the sale deeds were executed for binding purposes, but still they held that Exhibit B-4 sale deed would not be binding on the plaintiffs while Exhibit B-3 sale deed would be binding. The reason for holding that Exhibit B-4 sale deed would not be binding on the minors was that on the date of the sale deed the Hindu Minority and Guardianship Act of 1956 was in force and under section 8 of that Act, the guardian had no right to dispose of the minors' interest without the permission of the Court. It is on this basis the Courts below held that Exhibit B-4 would not be binding, and they passed a preliminary decree for partition of the plaintiffs' two-thirds share in items 1 to 3, *viz.*, those items covered by Exhibit B-4 sale deed. The first defendant succeeded with regard to Exhibit B-3 sale deed. Against the decree passed by the trial Court with regard to Exhibit B-4 sale deed, the appellants herein preferred an appeal. The learned Subordinate Judge of Cuddalore by judgment dated the 12th of July, 1974, dismissed the appeal. Hence the present second appeal by defendants 3 and 5.

2. The learned counsel for the appellants put forward three contentions to challenge the decrees of the Courts below: The first is that prior to the institution of the present suit, there was an original petition for permission of the Court to sue *in forma pauperis* and that petition, *viz.*, O.P. No. 36 of 1967 was dismissed though for default, with costs in favour of the first defendant: consequently under Order 33, rule 15, Civil Procedure Code, without his costs of that petition being paid, this suit should not have been entertained. The second contention is that the first plaintiff having been born on 3rd December, 1945 and the suit having been instituted on 16th December, 1967, the suit was barred by limitation not merely with regard to the first plaintiff but with regard to the second plaintiff also, as the cause of action was the same. The third contention is that when the Courts below granted a decree in favour of the plaintiffs, having regard to the finding that the purpose for which the sale deed was executed was binding on the plaintiffs, the Courts below should have directed the plaintiffs to refund two-thirds share of the consideration for Exhibit B-4.

3. As far as the first contention is concerned, I am clearly of the opinion that the same is unsustainable. Order 33, rule 15, Civil Procedure Code, reads as follows:

> "An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that the plaint shall be rejected if he does not pay, either at the time of the institution of the suit or within such time thereafter as the Court may allow, the costs, if any, incurred by the State Government and by the opposite party in opposing his application for leave to sue as an indigent person."

Consequently this provision will be attracted only if the earlier petition was dismissed on merits. The word "refusing" occurring in Order 33, rule 15, Civil Procedure Code supports this inference. Independent of this, there is a Bench decision of this Court in *Polepeddi Krishnamoorthy* v. *Polepeddi Ramayya*[1]. In that judgment, it was held :

> "The principle underlying rule 15 appears to be that of *res judicata viz.*, that the Court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under rule 5 (*a*) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be re-presented. This goes a good deal further than the principle of *res judicata* for it gives the force of *res judicata* to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the legislature. It is noticeable that rule 15 refers to an order 'refusing to allow an applicant to sue as a pauper' and these words are the identical words used in rule 7, clause (3) and it is clear that rule 15 applies to such an order. I can see no reason for extending it to include an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance the rejection and return of a petition presented by an agent can hardly be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its re-presentation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not. There is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. The view was adopted by my learned brother in *Chinnammal* v. *Papathi Ammal*,[1] which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under rule 6 and a consequent order under rule 7 the order rejecting the application is not a bar to a second application."

In view of this judgment it is clear that Order 33, rule 15, Civil Procedure Code, applies only to a case where a prior application for permission to sue *informa pauperis* was rejected on merits, and not to a case where the application was dismissed for default, as in the present case.

4. The second contention of the learned counsel for the appellants, as I pointed out already, relates to the suit having been barred by limitation, on the ground that the first plaintiff was born on 3rd December, 1945 and the suit was instituted on 16th December, 1967. However, the Courts below, on examination of the evidence placed before them, have come to the conclusion that the first plaintiff was born, not on 3rd December, 1945 but on 6th June, 1947 and that therefore the suit filed on 16th December, 1967 was within time. This finding is amply supported by evidence, and the same will have to stand.

5. As far as the third point is concerned at no stage of the proceedings the appellant ever put forward the contention that in the event of its being held that Exhibit B-4 sale deed is not binding on the plaintiff, the plaintiffs should be called upon to refund two-thirds of the consideration under Exhibit B-4. It may be that the one-third of the properties,

1. (1927) I.L.R. 50 Mad. 63 : 51 M.L.J. 79: A.I.R. 1926 Mad. 875.

1. A.I.R. 1925 Mad. 986.

the share of the mother, the second defendant sold under Exhibit B-4 was worth the entire consideration ; and that may be the reason why the appellants had not put forward any such claim. Under these circumstances I am unable to entertain that claim put forward for the first time in the second appeal.

6. Hence, the second appeal fails and is dismissed. There will be no order as to costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

M. A. B. Mohd. Sultan Mohideen and others .. *Appellants**

v.

Official Trustee, Madras and another .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 2 (8)—Market — Arrangement for collection of rents under deeds styled as lease deeds executed by Official Trustee in favour of S—Determination of lease and suit for possession by Official Trustee—Claim by S that Rent Control Act applied and civil suit was barred—Official Trustee whether represented all the interests of the shareholders — Decree in favour of Official Trustee—Appeal by S—S dying pending appeal — L. Rs. of S brought on record — Appeal dismissed — Further appeal by L.Rs.—Law in force on the date when suit or appeal was disposed of applicable—Section 2 (8) as amended by in 1973 would apply—L. Rs. not statutory tenants under the Rent Control Act — Construction of document — Description as lease would not preclude Court from determining real nature of the document—Documents held to merely vest a right to collect rents—Suit for possession competent — Acceptance of rents from L. Rs by Official Trustee would not create fresh tenancy—Official Trustee could represent a small proportion of Trustees—Section 2 (8) declaratory.

S entered into an arrangement with the Official Trustee, Madras under Exhibits A-1 and A-2 which were styled as lease deeds in and by which *S* obtained a right to collect rents from a market called Connemara Market in Madras. This was for the administrative convenience of the Official Trustee. Subsequently, the Official Trustee determined the lease and called upon *S* to surrender possession. On *S*'s refusal, the Official Trustee filed a suit for possession. *S* contended that the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, applied to the case and therefore the suit was not maintainable. *S* also contended that the noitce determining the lease was not in order and that the Official Trustee did not represent all the shareholders. The suit was decreed by the trial Court. *S* appealed to the High Court. Pending appeal, *S* died and his legal representatives were brought on record. The appeal was dismissed against which the L.Rs. filed a Letters Patent Appeal.

Held: Even under the old definition in section 2 (8), the Legislature made it clear that unless the heir or the legal representatives, who project a claim to be continued as statutory tenants established as a fact, that he or they was or were living with the deceased tenant, *viz.*, his or their predecessor-in-interest, he or they could not obtain the statutory benefits under the provisions of Act XVIII of 1960. Due to the amendment (as per Act XXIII of 1973), the Legislature again declared its intention by clarifying the position and by laying emphasis upon such association of the heirs and legal representatives with the deceased tenant. On an examination of the two limbs of the definition of "tenant" in section 2 (8) (as amended in 1973) it was apparent that in order to secure continuity in the tenancy the heirs should prove, as a fact, that they were in the case of a residential building, residing with the deceased tenant as

*L.P.A. No. 12 of 1976 and
O.S.A. No. 3 of 1976 21*st June*, 1977.

members of his family till his death and equally prove, in the case of a non-residential building, that they were in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continued to carry on such business thereafter. It was therefore fairly clear that such a commercial association with the deceased tenant in the business or non-residential activity which was carried on by the deceased tenant in the premises was a *sine qua non* to claim the benefits under section 2 (8) (*iii*) of the Act. [*Paras.* 3 *and* 4.]

In a case like this, where section 2 (8) of the Act is merely classificatory and declaratory of the pre-existing intent of the Legislature, the Court is bound to apply the law as on the date when the suit or the appeal is disposed of. The appellants who were admittedly not associated with the deceased tenant, nor were in continuous association with the tenant for the purposes of carrying on the business of the tenant upto his death, nor did continue to carry on any such business thereafter, would not be entitled to the special privileges as statutory tenants under Act XVIII of 1960.

[*Para.* 4.]

At no time had *S* occupied the non-residential premises and did any business there. He never carried on any business which the appellants could proclaim to have continued. Courts ought not to be guided merely by the nomenclature and the description given to a particular document by the parties. If, on a general reading of the document concerned, a different legal or jural relationship could be carved out on the peculiar facts and circumstances of a given case, then the mere description given to a document by the parties might not have the weightage it would normally demand. In this case, the document was described as a lease. A lease implied a transfer of interest in immoveable property for the purpose of enjoying it. Here the transferee, *viz.*, the predecessor-in-interest of the appellants did never enjoy the property at all, nor did he carry on any business in it. In effect, the right to collect the rents from the market was farmed out to the transferee who was called the lessee and he was apparently making a profit out of it. The transferee or lessee undertook certain obligations under the so-called lease, but that would not make any difference. The purport of Exhibits A-1 and A-2 was to enable the transferee called the lessee to act as the agent of the Official Trustee with an interest coupled with such agency to appropriate towards his services the excess collections to himself and pay an agreed sum called rent to the Official Trustee. Exhibits A-1 and A-2 were not lease deeds but only instruments vesting a right in *S* to collect rents from the Connemara Market. But he had an interest in the said collections. Thus, the very foundation of the contention of the appellants failed and the suit for possession, in such circumstances, filed by the Official Trustee was in order. The Act could not apply, nor could it he invoked by either party, as Exhibits A-1 and A-2 did not forge the legal relationship of landlord and tenant as between the Official Trustee and the deceased '*S*'.

[*Para.* 5.]

Merely because the Official Trustee accepted the so-called rents from the appellants after the demise of the original transferee, it would not mean that a fresh tenancy had been created. It depended upon the proof of the intention of the parties. [*Para.* 6.]

As regards the contention that the Official Trustee represented only a small proportion of the sharers, this was not open to challenge by the other sharers, for the Official Trustee asked for possession and if there were any sharers interested in sharing the rents and profits of the market, it was open to them to work out their rights as against the Official Trustee. [*Para.* 8.]

Cases referred to:—

Lachmeshwar v. *Keshwar Lal*, 1940 F.C.R. 84: (1941) 1 M.L.J. (Supp.) 49: 53 L.W. 373: A.I.R. 1941 F.C. 5; *Lakshmi Ammal* v. *Narayanaswami*

Naicker, (1950) 1 M.L.J. 63: 63 L.W. 21: A.I.R. 1950 Mad. 321.

L.P.A. No. 12 *of* 1976.

Appeal under clause 15 of the Letters Patent against the Judgment and decree of the Honourable Justice Mr. N. S. Ramaswami, dated 1st December, 1975 and passed in Appeal No. 19 of 1972 preferred to the High Court against the decree of the City Civil Court (2nd Assistant Judge), Madras dated 8th July, 1971 in O.S. No. 1956 of 1969.

O.S.A. No. 3 *of* 1976.

Appeal under clause 15 of the Letters Patent from the Judgment and order of the Honourable Mr. Justice S. Mohan, dated 23rd December, 1975 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Application No. 3234 of 1975 in O.P. No. 158 of 1920.

R. G. Rajan, V. Govindarajulu and *B. Thanikachalam,* for Appellants.

S. Narayana Ayyanyar, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—These two appeals are somewhat connected. L.P.A. No. 12 of 1976 is directed against the Judgment of N. S. Ramaswami, J., in Appeal No. 19 of 1972 and O.S.A. No. 3 of 1976 is against an order of S. Mohan, J., in Application No. 3234 of 1975 in O.S. No. 158 of 1920. We shall first deal with L.P.A. No. 12 of 1976.

2. M. A. Mohamed Burhanuddin Sahib entered into an arrangement with the Official Trustee, Madras, under Exhibits A-1 and A-2 dated 12th May, 1961 and 4th January, 1963, which were styled as lease deeds, in and by which Mohamed Burhanuddin Sahib (hereinafter referred to as the original tenant) obtained a right to collect the rents from a market called Connemara Market in Pudupet, Madras. There are a number of stalls in the said market which is used as a daily market. Apparently for administrative convenience, the Official Trustee enabled Mr. Sahib to collect the rents from the various stalls in the market and pay him a monthly rent of Rs. 970 and the tenant was obliged to perform various other obligations which he undertook under the lease deed. For the purpose of this appeal, it is unnecessary to state in detail the terms and conditions under which the arrangement was entered into between the Official Trustee and late Mr. Sahib. The lessee, as Mr. Sahib was called, was to meet all the commitments as regards electricity, costs of minor repairs and pay the water supply charges as also the charges to the Corporation of Madras for running the market in accordance with the rules of the Corporation of Madras, and the lessor, *viz.,* the Official Trustee, was to pay the property-tax on the premises and continue the arrangement as above for a period of five years from 1st March, 1961, with option to Sahib to renew the so-called lease for a further period of three years on the same terms and conditions enumerated in what is known as the lease deed. Under Exhibit A-4 the Official Trustee determined the lease with effect from 31st March, 1969 and called upon Sahib, who was the first defendant in the main suit instituted by the Official Trustee, to surrender possession. The first defendant failed to do so. Hence the suit for possession was filed by the Official Trustee impleading the said Mohamed Burhanuddin Sahib as the first defendant and the second defendant who is said to have purchased a share in the property in ancillary proceedings. The Official Trustee impleaded the above second defendant only by way of abundant caution and never sought relief against him. The first defendant's contentions were three-fold. Firstly, his contention was that the Madras Buildings (Lease and Rent Control) Act XVIII of 1960 (hereinafter referred to as the Act) was applicable to the building and therefore, a bare suit for eviction in a civil Court and for consequential possession does not lie. He questioned the jurisdiction of the civil Court to entertain the suit for possession. Secondly, he would say that the notice of determination of the tenancy was not in order

and therefore, the suit has to fail. He also contended that the Official Trustee did not represent all the interests of the shareholders and that therefore, the suit as such and as framed is not maintainable. The suit was originally tried in the City Civil Court and it resulted in a decree in favour of the Official Trustee. The first defendant filed an appeal to this Court, but he died pending appeal on 11th May, 1972. Thereupon, the present appellants including the second defendant were brought on record as the deceased first defendant's local representatives. N. S. Ramaswami, J., once again considered the objections of the appellants and would not agree with him. In particular, he would not countenance the contention that in view of the amendment of section 2 (8) of Act XVIII of 1960 by Act XXIII of 1973, the present proceeding for possession against them is incompetent as they have secured a statutory right to continue in the premises under the provisions of Act XVIII of 1960 and that therefore, the suit for possession in a civil Court ignoring the provisions of the Special Enactment, *viz.*, Act XVIII of 1960, is not in order. He would also not agree with the learned counsel for the appellants that the mere fact that the Official Trustee accepted the rents from the appellants after the death of the first defendant would by itself establish that a fresh tenancy is created and therefore, the suit as framed cannot be proceeded with. The last contention that the Official Trustee represented only some of the estate did not gain favour with the learned Judge. On the question whether the notice of determination of tenancy was valid and proper, he would observe that validity of the notice as per the original of Exhibit A-1 had not been questioned in any other respect except that the same had not been issued by a person who represented the entire estate. The learned Judge discountenanced this contention observing that the Official Trustees was not representing the entire estate, but only the other beneficiaries barring the second defendant who has also become a legal representative of the first defendant after his death. Ultimately, he dismissed the appeal. Hence, the Letters Patent Appeal. The same contentions are pursued before us by the learned counsel for the appellants.

3. The Madras Buildings (Lease and Rent Control) Act, being a beneficial legislation, is intended to serve certain definite objective of the Legislature. Under the old Act, XVIII of 1960, the tenant has been defined as meaning a person by whom or on whose account rent is payable for a building and includes the surviving spouse or any son or daughter or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour etc., etc. Hence under the old Act, there was no express reference to a non-residential premises, but on a fair reading of the said definition, the benefits of statutory tenancy provided for in this sub-clause could be availed of by the heirs and legal representatives of a deceased tenant provided they were also living with the deceased in the building as members of the tenant's family upto the death of the tenant. This requirement to get the statutory entitlement reflects the purpose of the Legislature. We are of the view that even under the old definition, the Legislature made it clear that unless the heir or the legal representatives, who project a claim to be continued as statutory tenant, establishes as a fact, that he or they was or were living with the deceased tenant *viz.*, his or their predecessor-in-interest, he or they cannot obtain the statutory benefits under the provisions of Act XVIII of 1960. When the definition was amended as per Act XXIII of 1973, the following clause was substituted in the place of the erstwhile clause (8) of section 2. Clause (8) of section 2 of the Act reads as follows:

> 'Tenant' means any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son or daughter, or the legal representatives of a deceased tenant who......
>
> (*i*) in the case of a residential building, had been living with the tenant in the building as a member of the tenant's

family upto the death of the tenant, and

(*ii*) in the case of a non-residential building, had been in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continues to carry on such business thereafter, and

a person continuing in possession after the termination of the tenancy in his favour etc., etc......."

4. Due to such an amendment, the Legislature, according to us, again declared its intention by clarifying the position and by laying an emphasis upon such association of the heirs and legal representatives with the deceased tenant. On an examination of the two limbs of the definition of 'tenant' in section 2 (8) as amended in 1973, one gains the impression that in order to secure continuity in the tenancy the heirs should prove, as a fact, that they were, in the case of a residential building, residing with the deceased tenant as members of his family till his death and equally prove, in the case of a non-residential building, that they were in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continue to carry on such business thereafter. It is therefore fairly clear that such a commercial association with the deceased tenant in the business or non-residential activity which was carried on by the deceased tenant in the premises is an essential *sine qua non* to claim the benefits under section 2 (8) (*ii*) of the Act. It appears to us that even after the amendment of the definition of 'tenant' in section 2 (8), the legislature maintained its legislative intent to ensure that only heirs and legal representatives who were living with or associated with the deceased tenant in the case of residential or non-residential buildings as the case may be, can claim the benefits of continuing as statutory tenants. This primordial requirement has to be complied with and if there is no proof of nexus in the matter of living or in the matter of the continued association in the quantum of mercantile activity of the deceased tenant, then the heirs or legal representatives, in each of those cases, would not be entitled to the benefits of Act XVIII of 1960. If, therefore, the halo of the above legislative intent pervaded the entire fabric of the particular legislation and if what has been achieved by the amendment is to declare and clarify such a pre-existing intent, then the question whether the amendment which is clarificatory in nature is retrospective in operation does not arise at all. Strong reliance was placed upon a decision of a Division Bench of this Court in *M/s. Killick Nixon Ltd., Bombay* v. *V. R. Narayana Rao*[1], to which Ramanujam and V. Ramaswami, JJ. were parties. That was also a case for recovery of possession. The question which came up for consideration before the Bench was whether the decision rendered by the trial Court became null and void in view of the amending Act XXIII of 1973. Directly the question did not arise as to what is the effect of the amending provision in section 2 (8) of the Act. The learned Judges, however, noticed the fundamental principle that a legal proceeding has to be dealt with in accordance with the law prevailing on the date of its disposal. In a case like this, where section 2 (8) of the Act is, as we said, merely clarificatory and declaratory of the pre-existing intent of the Legislature, this Court is bound to apply the law as on the date when the suit or the appeal was disposed of. In this sense, therefore, N. S. Ramaswami, J., was right. Two decisions have been referred to by the learned Judges of the Division Bench referred to above. One is that of the Federal Court in *Lachmeshwar* v. *Keshwar Lal*[2], and the other, of our own Court in *Lakshmi Ammal* v. *Narayanaswami Naicker*[3]. In those cases, the proposition is well-settled that the rights of parties have to be determined as on the date of the disposal of the appeal by this Court, and that therefore, this Court has to take into account the statutory provisions as amended,

1. Appeal No. 518 of 1973.
2. (1940) F.C.R. 84: (1941) 1 M.L.J. (Supp.) 49: 53 L.W. 373: A.I.R. 1941 F.C. 5.
3. (1950) 1 M.L.J. 63: 63 L.W. 21: A.I.R. 1950 Mad. 321.

in deciding the rights of parties before it as on the date of disposal. It follows, therefore, that the appellants who were admittedly not associated with the deceased tenant, nor were in continuous association with the tenant for the purpose of carrying on the business of the tenant upto his death, nor did continue to carry on any such business thereafter, would not be entitled to the special privileges as statutory tenants under Act XVIII of 1960.

5. The next question is whether Exhibits A-1 and A-2 are really leases at all. Though this question was not mooted in its true perspective, yet it has become necessary for us to adjudicate upon the real nature of the transaction entered into between the Official Trustee and the late Sahib, the predecessor-in-interest of the appellants. Learned counsel for the appellants vehemently contends that the exhibits created a jural relationship of landlord and tenant within the meaning of the Act. It is common ground that at no time Sahib occupied the non-residential premises and did any business there. He never carried on any business which the appellants can proclaim to have continued. Courts ought not to be guided merely by the nomenclature and the description given to a particular document by the parties. If, on a general reading of the document concerned, a different legal or jural relationship could be carved out in the peculiar facts and circumstances of a given case, then the mere description given to a document by the parties may not have the weightage it would normally demand. In this case, the document is described as a lease. A lease implies a transfer of interest in immovable propetry for the purpose of enjoying it. Here, the transferee, *viz*., the predecessor-in-interest of the appellants, did never enjoy the property at all, nor did he carry on any business in it. In effect, the right to collect the rents from the market was farmed out to the transferee who is called the lessee, and he was apparently making a profit out of it. The transferee or lessee undertook certain obligations in the so-called lease, but that would not make any difference. The purport of Exhibits A-1 and A-2 appears to us to be to enable the transferee called the lessee to act as the agent of the Official Trustee with an interest coupled with such an agency to appropriate towards his services the excess collections to himself and pay an agreed sum called rent to the Official Trustee. If the transferee was in occupation of a portion of the premises, it might be contended by the legal representatives that in so far as that portion of the non-residential building occupied by the deceased tenant is concerned, they could claim the statutory right by reason of succession. But, they should satisfy the primary requirements laid down in section 2 (8) of the Act. They are unable to do so in this case. In our view, therefore, Exhibits A-1 and A-2 cannot rightly be accepted as lease deeds, but they are instruments which vested a right in Sahib to collect rents from the Connemara Market. But he had an interest in the said collections. Thus, the very foundation of the contention of the learned counsel for the appellants fails and the suit for possession, in such circumstances, filed by the Official Trustee was in order. The Act, in our view, could not apply, nor could it be invoked by either party, as Exhibits A-1 and A-2 do not forge the legal relationship of landlord and tenant as between the Official Trustee and the deceased Sahib.

6. We also agree with the learned Judge that merely because the Official Trustee accepted the so-called rents from the appellants after the demise of the original transferee, it would not mean that a fresh tenancy has been created. It depends upon the proof of the intention of the parties. In fact, the Official Trustee, when he filed O.S. No. 5584 of 1974 for recovery of the various amounts which the appellants failed to pay by then, characterised the said sums as damages for use and occupation of the building. The claim would not be based as such if the relationship was that of a landlord and tenant. This contention also fails.

7. Regarding the notice of determination of tenancy, we are in entire agreement with N. S. Ramaswami, J., and his observations regarding the same and it is unnecessary for us to consider this contention any more,

8. As regards the last contention that the Official Trustee represented only a small proportion of the sharers, this is not open for challenge by the other sharers, for the Official Trustee asks for possession and if there are any sharers interested in sharing the rents and profits of the market; it is open to them to work out their rights as against the Official Trustee.

9. For the reason that there was no jural relationship of landlord and tenant as between the Official Trustee and the late Sahib and also because the notice of determination of tenancy was in order, and as section 2 (8) of Act XVIII of 1960 is declaratory of a pre-existing legislative intent, we are unable to agree with the learned counsel for the appellants that the Judgment of N. S. Ramaswami, J., needs interference. The appeal fails and it is dismissed.

10. Now, coming to I.S. No. 3 of 1976, S. Mohan, J., passed the following order:—

> "I see no reason to set aside my order because all that the applicant says is that he is in constructive possession. The earlier order of mine was to give effect to the judgment of N. S. Ramaswami, J., rendered in A.S. No. 19 of 1972. In this view, I see no merit in those applications. Hence they will stand dismissed. Counsel's fee Rs. 150 in all the three applications".

The learned Judge referred to the judgment in A.S. No. 19 of 1972 and confirmed that the Official Trustee was entitled to take possession of the market. What was, however, urged before him was that a regular execution petition ought to have been taken by the Official Trustee to obtain possession and that the Official Trustee ought not to have approached the Original Side Judge for directions in the matter of collecting the rents from the actual occupants of the stalls in the market. Such a direction was made by S. Mohan, J., having regard to the judgment of N. S. Ramaswami, J., in A.S. No. 19 of 1972 which we have confirmed in L.P.A. No. 12 of 1976. Having found that such administrative directions were given by S. Mohan, J., the applicants who were the appellants in L.P.A. No. 12 1976, filed Application No. 3234 of 1975 seeking to set aside the order made by S. Mohan, J., earlier enabling the Official Trustee to constructively take delivery of the property which would enable him to collect the rents from the stall-holders direct. The learned Judge, again, referred to the judgment of N. S. Ramaswami, J., and reiterated that the Official Trustee had the requisite authority to seek for such constructive possession. We see no reason to interfere. O.S.A. No. 3 of 1976 also fails and it is dismissed. There will be no order as to costs in both the appeals.

S.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

A. K. Parvathambal .. *Appellant**

v

Attimuthu Gounder and others .. *Respondents.*

(A) *Transfer of Property Act (IV of* 1882), *section* 55 (2); *Indian Evidence Act (I of* 1872), *sections* 62, 92—*Suit for damages on a contract of indemnity—Sale deed executed by* 'A' *on behalf of himself and his minor brother* 'R' *of joint family properties*—R *on becoming major filing suit against purchaser for partition of his share—Suit compromised by purchaser's wife agreeing to pay Rs.* 62,500 *in respect of* R's *share*—'A' *one of the defendants in the suit remaining* ex parte—*Purchaser's wife filing suit for damages against* 'A' *and his sons for the recovery of Rs.* 62,500 *with interest as due to defect in title—Contention of* 'A' *that purchaser was aware of the defect even at the time of purchase —Suit dismissed by trial Court.*

(B) *Documents — Interpretation — Burden on party alleging coercion and undue influence in executing sale deed to substantiate plea—When recitals in a deed are clear oral evidence not permissible to give contrary interpretation—Construction of document to be on the language used therein.*

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* A. No. 139 of 1971. 26*th November*, 1976.

D owed large sums of money to *P* amounting to Rs. 1,89,000 and odd. To discharge this debt, *D* agreed to convey his properties admittedly worth more than Rs. 3,00,000 to *P* under Exhibit B-1 dated 7th July, 1933 for Rs. 1,89,821-14-0 only with the specific understanding that *P* would reconvey the properties to *D* on the latter discharging the debts due to him. Subsequently *P* died in 1939 leaving behind his sons *A* and *R*. In 1944, *A* executed a sale deed Exhibit A-1 acting on behalf of himself and his minor brother *R* in favour of *D* for a sum of Rs. 45,000 the same properties as were purchased by *P* from *D*. This was executed in accordance with the decision of the arbitrators who settled the differences between *A* and *D*. Exhibit A-1 contained a recital regarding the arbitration. Subsequently *R* became a major and filed a suit against *D* and also impleaded *A* as one of the defendants and claimed partition of his share of the properties sold by *A* as not being for family necessities. This suit was numbered as O.S. No. 178 of 1951. Pending this suit, *D* died and his wife "*X*" was brought on record as his legal representative. '*A*' remained *ex parte*. Ultimately this suit was compromised and *X* on 16th April, 1959 deposited Rs. 62,500 as payable to *R* in the suit as per the compromise. Subsequently, *X* filed the present suit against *A* and his sons for reimbursement of the sum of Rs. 62,500 with interest thereon based on the indemnity contained in the sale deed Exhibit A-1. *A* who was the first defendant contended that both the documents Exhibits B-1 and A-1 were nominal, that Exhibit A-1 was executed under coercion and undue influence and the consideration of Rs. 45,000 was inadequate considering the real value of the properties conveyed, that *D* was aware on the date of purchase of the right of *R* in the properties and that the plaintiff was therefore not entitled to the sum of Rs. 62,500. The trial Court dismissed the suit. *X* appealed.

Held: The sale under Exhibit A-1 was more a deed of family arrangement rather than a sale deed in a strict legal sense. It was not vitiated on the ground that it suffered from inadequate consideration. [*Para*. 11.]

The first defendant *A* who set up the case that the sale was brought about by coercion, undue influence etc., had not chosen to come to the witness box and examine himself to substantiate his plea. This non-examination of the first defendant was detrimental to his case and no weight therefore could be attached to the evidence of the other witnesses in respect of this plea. When a party pleaded to certain allegations, ordinarily he should go into the witness box and give his evidence in support of such a plea, unless there were acceptable reasons for his not doing so. In the present case, no reason was assigned as to why the first defendant stood outside the witness box. The finding of the lower Court that the sale deed Exhibit A-1 was vitiated by fraud, undue influence and coercion was set aside. [*Para*. 12.]

The recitals in Exhibit A-1 showed that the arbitrators took into consideration the income from the lands while arriving at the figure of Rs. 45,000 as consideration towards Exhibit A-1. This fact showed that Exhibit B-1 was not a complete sale in the strict sense of the term enabling *P* to enjoy the properties worth Rs. four lakhs or more (Para. 7 of the written statement) and income therefrom, absolutely for ever, but was subject to an arrangement for reconveyance back to *D*. The real consideration was the said sum of Rs. 45,000 and the benefit derived by *P* and the defendants by enjoying the properties for a considerable length of time. Thus, at the time when Exhibit A-1 came into existence the arbitrators had taken into consideration the fact that *P* was enjoying the suit properties and the income therefrom for a considerable length of time and then decided that the first defendant and his brother *R* (sons of *P*) should reconvey the properties to *D* on receiving a sum of Rs. 45,000. Thus, the sale deed Exhibit A-1 was really a reconveyance executed by the first defendant and his brother in favour of *D* in the above circumstances. The sale deeds Exhibits A-1 and B-1 could

not be said to be nominal, but they really came into existence as per the arrangement between the parties. [*Para.* 14.]

When the terms and recitals (in a document) by themselves were very clear and unambiguous, oral evidence contrary to them could not be accepted. Regarding the construction of the terms of a document, it was the accepted principle that the intention of the parties, was the determining factor and that intention had to be gathered from the document itself so as to find out the legal effect of the words used by the parties. If the words were express and clear effect had to be given to them and any extraneous enquiry was ruled out. Wherever a Court had to deal with a document which had been proved, its duty was to ascertain its real meaning and no evidence of any intention inconsistent with the plain meaning of the words used therein would be admitted to defeat the object of the language used. [*Para.* 15.]

The conduct of the first defendant *A* in remaining *ex parte* in O.S. No. 178 of 1951 would obviously show that he and *R* had been acting in concert and collusion to the detriment of the case of *D*. Therefore, the present version of the first defendant that Exhibit A-1 was executed under threat, coercion etc., was an afterthought and could not be true. For the above reasons, it was held that the first defendant clearly represented to *D*, at the time when Exhibit A-1 was executed that he and *R* had full title in the properties and undertook to be responsible for any loss that might accrue to *D* subsequently. [*Para.* 16.]

Since *D* purchased the property only on the assurance given by the first defendant as per the recitals the first defendant would certainly be liable for the loss sustained by the plaintiff due to the claim made by *R* in O.S. No. 178 of 1951. [*Para.* 17.]

As seen from the decision in *Thammineni Paparao and others* v. *Dhavala Polinaidu and another,* [(1945) 1 M.L.J. 323: 58 L.W. 121: A.I.R. 1945 Mad. 205], even if the vendee had knowledge of the defect in title, the vendor would be liable in damages for the breach of the covenant of title. *A fortiori* therefore, in the present case where the vendee could not be said to have any knowledge of the defect in title, he would be entitled to seek for recovery of the loss sustained by him, especially in the face of the clearly expressed covenant of title and covenant for freedom from incumbrances contained in Exhibit A-1. The first defendant and his minor sons were certainly liable to reimburse the sum of Rs. 62,500 to the plaintiff. [*Paras.* 21 *and* 22.]

Cases referred to:—

Narayan v. *Bhau Rao,* A.I.R. 1956 Nag. 124; *Ramalinga Padayachi* v. *Natesa Padayachi,* (1967) 2 M.L.J. 166: I.L.R. (1967) 1 Mad. 95: 80 L.W. 643: A.I.R. 1967 Mad. 461; *Adikesavan Naidu* v. *Gurunatha Chetti,* (1917) I.L.R. 40 Mad. 338: 32 M.L.J. 180: 5 L.W. 425; *Mohamed Ali Sheriff* v. *Venkatapathi Raju,* 39 M.L.J. 449: 11 L.W. 537: A.I.R. 1920 Mad. 634; *Thammineni Papa Rao* v. *Dhavala Polinaidu,* (1945) 1 M.L.J. 323: 58 L.W. 121: A.I.R. 1945 Mad. 205.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore in Original Suit No. 109 of 1964.

K. Hariharan, for Appellant.

N. Varadarajan, for Respondents.

The Judgment of the Court was delivered by

Ratnavel Pandian, J.—The unsuccessful plaintiff in O.S. No. 109 of 1964 on the file of the Court of the Subordinate Judge, Coimbatore, is the appellant herein. In the said suit she sued to recover from the first defendant personally and from defendants 2 and 3 from out of the family properties in their hands, a sum of Rs. 79,544 based on a contract of indemnity. According to the plaintiff, on 7th June, 1944, as per the sale deed Exhibit A-1 the first defendant, for himself and as guardian for his then minor brother Ramaswami Gounder, sold certain properties for Rs. 45,000 to the husband of the plaintiff benami in the name of one Gopalakrishnan, the fourth defendant herein. As per the terms of the said sale deed

and the special undertaking therein, the vendor, the first defendant, has undertaken to be responsible for any loss that might be caused to the vendee (plaintiff's husband) or for any defect in the properties. In fact, the properties originally belonged to the plaintiff's husband and the first defendant's father had taken them from him under some arrangement and as a result of a panchayat it had been agreed that they should be conveyed back to the plaintiff's husband free of encumbrance. But, what happened was that the said Ramaswami, brother of the first defendant, on his attaining majority, filed a suit O.S. No. 178 of 1951 in sub-Court, Coimbatore against the first defendant, the plaintiff's husband and the fourth defendant, who were defendants 1, 3 and 2 respectively therein. Since the plaintiff's husband died pending suit, his widows, *viz.*, the plaintiff herein and two others were impleaded as his legal representatives. The first defendant, instead of upholding the sale under Exhibit A-1 and supporting the plaintiff's husband, chose to remain *ex parte*. Likewise, the fourth defendant also remained *ex parte*. The suit ended in a compromise decree as per which Ramaswami was directed to be given 1|5 share in the suit properties or else the sixth defendant therein (plaintiff herein) should pay Rs. 62,500 to Ramaswami, the plaintiff therein, in full quit of all claims. The plaintiff, (6th defendant therein) promptly deposited on 16th April, 1959 itself the said sum of Rs. 62,500 into Court. Now, the plaintiff, herein has claimed that but for the compromise she would have insisted upon other claims in the previous suit and therefore the first defendant herein is bound to indemnify and reimburse the plaintiff for the payment which she was forced to make in that suit. She also claims that defendants 2 and 3, who are the sons of the first defendant, are bound by the contract or indemnity given by the first defendant even though they have created a fraudulent partition deed on 4th December, 1959.

2. According to the contentions of the first defendant, the plaintiff's husband had sold the suit properties as per the sale deed Exhibit B-1 dated 7th July, 1933 for Rs. 1,89,821-14-0 in favour of the first defendant's father Perumal Gounder, who himself was none other than the sister's husband of the plaintiff's husband. That sale deed was in fact a nominal one and possession remained with the plaintiff's husband. Perumal Gounder died in 1939, when this defendant was aged 15 and his younger brother Ramaswami 12 or 13. Even before the death of Perumal Gounder, Doraiswami Gounder, the plaintiff's husband, wanted to get documents from Perumal Gounder to establish his full ownership. Doraiswami Gounder was a powerful and influential man. In 1944, when the first defendant's marriage was being negotiated, Doraiswami Gounder threatened to forcibly stop the marriage unless the first defendant executed the documents wanted by the former. Under these circumstances, due to fraud, force, coercion and misrepresentation, the first defendant on 7th June, 1944 executed Exhibit A-1 for Rs. 45,000 and therefore the said sale deed is not valid and binding on him. Therefore, the plaintiff cannot enforce the conditions mentioned therein. Since Exhibit B-1 was nominal, Exhibit A-1 was also nominal. Since this defendant's father Perumal Gounder was helping Doraiswami Gounder financially since the latter was involved in criminal cases and was in financial difficulties, large sums were found due to the former (Perumal Gounder). Since Doraiswami Gounder did not discharge the said debts, this defendant suffered. His brother Ramaswami Gounder filed O.S. No. 178 of 1951. Since no relief was claimed against this defendant, he remained *ex parte*. That suit ended in a compromise under which the estate of Doraiswami Gounder was made liable to pay Rs. 62,500 being the plaintiff's share of the amount. This defendant stated that a like sum of Rs. 62,500 would also be due to him on the same date. The present suit has been started just as a counterblast to the said claim of this defendant. This defendant is not bound by the said terms of the compromise decree and is not bound to reimburse the

plaintiff in this suit. The partition between this defendant and his sons is true and binding. The suit properties, according to this defendant, are not the joint family properties of Perumal Gounder, but his self-acquisitions. This defendant executed Exhibit A-1 not as a joint family manager but as guardian of his brother Ramaswami and therefore this defendant cannot be made liable for breach of any covenant of title. The suit is barred by limitation and the claim is also excessive.

3. Defendants 2 and 3 contended that they did not derive any benefit from the sale transactions and that they are not in any way liable for the suit claim. In other respects, they adopt the written statement filed by the first defendant.

4. The fourth defendant remained *ex parte*.

5. On the above pleadings, the following issues were set for trial:

1. Whether the covenant for title and the special undertaking given by the vendor in the sale deed, dated 7th June, 1944 are not binding upon the defendants? Is the vendor (1st defendant) liable to reimburse the plaintiff?

2. Is the compromise decree in O. S. No. 178 of 1951, Sub-Court, Coimbatore, true, valid and binding on defendants?

3. Whether the sale deed, dated 7th June, 1944 is vitiated by fraud, coercion and undue influence?

4. Whether the sale deeds of 1933 and 1944 are nominal and is the plaintiff not entitled to rely on the covenant of title, if any?

5. Whether the will alleged by the plaintiff is true, valid and binding on defendants and is the plaintiff entitled to sue?

6. What is the amount of compensation that the plaintiff will be entitled to?

7. Whether the plaintiff is entitled to any interest?

8. Whether the suit is barred by limitation?

9. Whether defendants 2 and 3 are liable to the suit claim?

10. To what reliefs are the parties entitled?

The plaintiff examined three witnesses including herself and marked Exhibits A-1 to A-12 and on the defendant's side D.Ws. 1 to 4 were examined and Exhibits B-1 to B-47 were marked.

6. The lower Court found that though the sale-deed Exhibit A-1 contained a covenant of title and also a special undertaking given by the first defendant, it would not be binding on defendants 2 and 3 since it was a nominal document and likewise it held that sale deed Exhibit B-1 was also a nominal document and the plaintiff was not entitled to rely upon the covenant of title under Exhibit A-1. The Court held that the compromise decree in O.S. No. 178 of 1951 was true, valid and binding on the defendants. On the basis of the above findings, it was held that the plaintiff was not entitled to any compensation from the defendants. Therefore, the question of interest also did not arise. Learned counsel for the defendants in that suit conceded that the suit was not barred by limitation. Ultimately the suit was dismissed with costs.

7. Even at the first instance, before going into the contentions of the parties, we would make it clear that both parties admit that Exhibit A-1 was executed by the 1st defendant on his own behalf and on behalf of Ramaswami Gounder in favour of Doraiswami Gounder, benami in the name of Gopalakrishnan, the fourth defendant herein, and that Exhibit A-12 was also later brought about by Doraiswami Gounder as purported to have been executed by the fourth defendant in his favour and as such Exhibit A -12 was a sham and nominal document. Further, Ramaswami Gounder, the plaintiff in O.S. No. 178 of 1951, has also averred in para. 9 of the plaint (Exhibit A-2) that the sale under Exhibit A-1 was taken by Doraiswami Gounder benami in the name of the fourth defen-

dant herein and later got it transferred in his name by Exhibit A-12 from Gopalakrishnan. Similarly, the first defendant in his written statement in this suit has not denied the allegation of the plaintiff in her plaint that the sale deed Exhibit A-1 was taken benami in the name of the fourth defendant. As already stated there is no controversy about the fact that Exhibit A-12 is only a nominal document brought about by the first defendant. Under these circumstances, we think it unnecessary to discuss any further about Exhibit A-12. Since Exhibit A-1 was admittedly taken by Doraiswami benami in the name of the fourth defendant, we shall, for the sake of convenience, refer to Exhibit A-1 as having been executed in favour of Doraiswami Gounder.

8. Mr. G. Ramaswami, appearing for the appellant-plaintiff, contended that the findings given by the Court below on issues 1, 3 and 4 that the sale deed Exhibit A-1 would not be binding on defendants 2 and 3 as it was a nominal one, that the covenant and the special undertaking could not be enforced, that the sale deeds Exhibits A-1 and B-1 are nominal and the plaintiff is not entitled to rely upon the covenant of title under Exhibit A-1 and that Exhibit A-1 is vitiated by fraud, undue influence and coercion, are all unsustainable in law. He would further contend that in view of the decision of the trial Court that Exhibit A-1 is the outcome of the Panchayat which settled the differences between these two families, the trial Judge ought to have decreed the suit as prayed for and that it is erroneous to hold that Exhibit B-1 was a nominal sale. According to him, the defendants, who attack the compromise in O.S. No. 178 of 1951 as not *bona fide* and proper, cannot rely on the same compromise as a family settlement, the Court below failed to appreciate that the warranty implied in section 55 (2) of the Transfer of Property Act is absolute and in the absence of a contract to the contrary, it is irrebuttable, and the trial Judge has overlooked the position that merely because the consideration for Exhibit A-1 sale is low, the warranty claimed by the plaintiff cannot be given a go-by. He would contend that the trial Judge has not properly appreciated the evidence of the witnesses examined on the plaintiff's side in its proper perspective, and also failed to appreciate that the first defendant who had been impleaded in the suit by his brother is bound to indemnify and reimburse the plaintiff for the payment which she was obliged to make under the decree in that suit.

9. It is the common that the plaintiff deposited a sum of Rs. 62,500 into Court on 16th April, 1959. According to the plaintiff, in pursuance of the compromise, she had paid this amount to D.W. 4 (T.P. Ramaswami Gounder) and she was damnified to that extent by the conduct of the first defendant, who is none other than the brother of D.W. 4. Hence, the plaintiff, on the alleged breach of the covenant of title and undertaking given by the first defendant in the sale deed Exhibit A-1, has sought for the recovery of the said sum of Rs. 62,500 from the first defendant herein. The main contention of the first defendant in resisting the claim of the plaintiff, among various other grounds, is that the sale deeds Exhibits A-1 and B-1 were sham and nominal and therefore no question of breach of covenant of title or indemnity could arise in case of such sales and the plaintiff is not entitled to have any claim as prayed for in the plaint.

10. Before going into the merits of the case, we shall now mention certain salient features for the proper appreciation of the evidence and a just decision of this appeal. Deceased Doraiswami Gounder, husband of the plaintiff, purchased certain properties for a sum and consideration of Rs. 45,000 under Exhibit A-1 a registered sale deed, in the name of the fourth defendant, *viz.*, Gopalakrishnan, from the first defendant for himself and as guardian of his brother Ramaswami Gounder. The sale deed Exhibit A-1 is said to have been obtained benami in the name of the fourth defendant. Admittedly, Doraiswami Gounder was owning about an extent of 300 odd acres of land. Dorai-

swami Gounder executed two mortgage deeds under Exhibit B-9, dated 13th June, 1921 and Exhibit B-11, dated 3rd February, 1922, each for a sum of Rs. 30,000, in favour of Perumal Gounder, father of the first defendant, Perumal Gounder, the mortgagee was directed to discharge the debts quoted in those documents. Exhibits B-7, B-8, B-10, B-12, B-13, and B-39 to B-47 are the receipts and vouchers evidencing such discharges. As the interest and principal under Exhibits B-9 and B-11 were not paid by the mortgagor, Doraiswami Gounder executed Exhibit B-1, dated 7th July, 1933 describing the said document as a sale deed in favour of Perumal Gounder for Rs. 1,89,821-14-0. In 1939, Perumal Gounder died. After the death of Perumal, it seems that there was some trouble about the transactions embodied in Exhibit B-1. It is the case of the first defendant that Doraiswami Gounder was pressing for reconveyance of those properties, under threat. According to the first defendant, he was aged about 15 at the time of the death of his father and his younger brother Ramaswami was two or three years younger to himself. As Doraiswami was a powerful and influential man and threatened to forcibly stop the marriage of the first defendant in the year 1944 when the first defendant was aged about 19 only, the first defendant executed the alleged resale on 7th June, 1944 for a sum of Rs. 45,000 under Exhibit A-1 for himself and as guardian of his then minor brother, Ramaswami (D.W. 4) in favour of the fourth defendant the illegitimate son and nominee of Doraiswami Gounder. The fourth defendant thereafter executed a sale deed under Exhibit A-12, dated 10th June, 1946 for a sum of Rs. 45,000 in favour of Doraiswami Gounder *alias* Krishnaswami Gounder. According to the plaintiff, the properties are very valuable and they originally belonged to the plaintiff's husband and were taken by the first defendant's father previously under a certain arrangement and had been agreed to be reconveyed to the plaintiff's husband free of encumbrances, as a result of a panchayat, and in the sale deed there is covenant of title and a clause of indemnity regarding the properties conveyed and also a special undertaking on the part of the vendor to be responsible for any defect or loss in respect of the title to the properties conveyed. An assurance was given that the properties were free of encumbrances and the entire consideration of Rs. 45,000 had been paid by the plaintiff's husband only on the basis of the assurance and representation made by the first defendant regarding the title and indemnity as specified in the sale deed. Further, it is the admitted case that the said Ramaswami, after becoming a major, instituted O. S. No. 178 of 1951 on the file of the Subordinate Judge, Coimbatore, for partition of his half share in the properties comprised and conveyed under the sale deed Exhibit A-1, impleading defendants 1 and 4 herein and the plaintiff's husband Doraiswami Gounder, as defendants. The present defendants, 1 and 4 stood *ex parte*. *Pendente lite* Doraiswami Gounder died and thereafter the plaintiff and the other two widows of Doraiswami Gounder were brought on record as the legal representatives—defendants 4 to 6. The suit was decreed on a compromise, as per which 1|5 share in the suit properties should be given or a sum of Rs. 62,500 should be paid in full quit of the claims of the plaintiff therein (Ramaswami Gounder) on or before 29th April, 1954. Under the will, Doraiswami Gounder had bequeathed the properties only in favour of the 6th defendant therein (present plaintiff). Accordingly, on 16th April, 1959, she deposited the said amount and had the decree satisfied. Hence, she has brought this claim against the first defendant who sold the property under Exhibit A-1 on his own behalf and on behalf of his brother Ramaswami Gounder, to indemnify and reimburse the plaintiff for the payment of Rs. 62,500 which she had been forced to make, by virtue of the covenant undertaken under the sale deed. The trial Judge, accepting the evidence of the first defendant, has held that Exhibit A-1 is vitiated by fraud, coercion and undue influence. Mr. G. Ramaswami, appearing for the appellant, would vehemently urge that the finding of the learned Judge is totally

incorrect in the light of the evidence and circumstances appearing in this case. He would urge that even assuming that Exhibit A-1 is a nominal document, when in pursuance of a panchayat Doraiswami Gounder had paid a sum of Rs. 45,000 for the reconveyance of the properties to perfect his title deed and when that recital was not challenged in the suit O.S. No. 178 of 1951 filed by Ramaswami Gounder and when the present first defendant chose to remain *ex parte* in the said suit, it could not at all be pleaded that the sale under Exhibit A-1 is vitiated by fraud, undue influence and coercion. According to him, even in case title has not at all passed, he would be entitled to get back the money. It is further submitted that the present contention raised by the first defendant in his written statement that possession of the property was always with the plaintiff's husband Doraiswami Gounder and Perumal Gounder had no possession, nor did he deal with the property as his own till he died in 1939 and that even before the first defendant's father died, there were negotiations and attempts on the part of the plaintiff's husband to obtain documents from Perumal Gounder to show that the former was still the owner of the properties, ought to have been raised even in the prior suit filed by his brother Ramaswami Gounder.

11. Therefore, according to the learned counsel, the first defendant, who has chosen to remain *ex parte* in O.S. No. 178 of 1951 without raising his defence put forth now in the present suit, is not at all justified in raising the present contention that the sale deeds Exhibits A-1 and B-1 are nominal and that Exhibit A-1 is vitiated by fraud and coercion. Exhibit A-2 is the certified copy of the amended plaint in O.S. No. 178 of 1951 on the file of Sub-Court, Coimbatore. It is averred in the said plaint by Ramaswami Gounder that the properties described in the schedule in that suit (which are the subject-matter of this suit also) belonged to the joint family of Ramaswami Gounder and his brother Athimuthu Gounder (first defendant) and that the properties originally belonged to Doraiswami Gounder who sold the same for the purpose of discharging the antecedent debts of Ramaswami Gounder's father Perumal Gounder for a sum of Rs. 1,89,821-14-0, by a sale deed, dated 7th July, 1933 and that therefore, after the death of Perumal Gounder, Ramaswami Gounder and Athimuthu Gounder got the properties by survivorship and have been in possession and enjoyment thereof absolutely from 1944 and that Athimuthu Gounder, purporting to act for himself and as guardian of Ramaswami Gounder, effected a sale of the properties on 7th June, 1944 and the said sale is not valid and binding on Ramaswami Gounder or his share in the properties. Thus, it is seen that Ramaswami Gounder in that suit has challenged the transaction though consideration passed for the same on the ground that there was no necessity to sell the properties and the said sale was not for the family benefit. In the written statement filed in this case by the first defendant, it is not pleaded that no money consideration passed. In paragraph 7, of the written statement it is pleaded that in the year 1944 the lands sold under the deed were worth about Rs. 4 lakhs or 5 lakhs and the annual income from the same would be Rs. 40,000 to Rs. 50,000. In paragraph 9 (*c*) it is averred that in O.S. No. 178 of 1951 there was a compromise by and under which the estate of Doraiswami Gounder was made liable to pay Rs. 62,500 being the plaintiff's 1|5 share of the amount if proper accounts were taken between the estates of Perumal Gounder and Doraiswami Gounder and that in that suit it was not declared that the sale was not binding on the plaintiff therein (Ramaswami Gounder) or that there was lack of title to the properties in the first defendant herein or in the then minor Ramaswami Gounder. Further, it is averred that it did not represent the value of the share of the plaintiff in the said suit in the properties on the basis that the sale under Exhibit A-1 was not binding upon Ramaswami Gounder; the compromise further declared that if the sum of Rs. 62,500 was not paid by a particular date the plaintiff therein was entitled to a 1|5 share in the properties. Thus, it is clear from the

above recital that the accounts were looked into between the estates of Perumal Gounder and Doraiswami Gounder and then it was settled that a sum of Rs. 62,500 should be paid over to Ramaswami Gounder towards his 1|5 share to which he was entitled as per the terms of the compromise. Mr. Kesava Iyengar, appearing for the respondents, would contend that the recital in the written statement that the amount of Rs. 62,500 did not represent the value of the share of the plaintiff in O.S. No. 178 of 1951 on the basis that the sale of 1944 by the first defendant was not binding upon the plainiff, is not contradicted by the plaintiff herein in her reply statement and therefore it should be taken that this plea of the defendant is correct. We are unable to agree with the learned counsel, because this is only the pleading of the first defendant and he has not proved it. On the other hand, the terms of compromise are clear that Ramaswami Gounder was given 1|5 share of the disputed items of properties in O.S. No. 178 of 1951 or a sum of Rs. 62,500 in full quit of all his claims. The recital in Exhibit A-1 relating to the circumstances under which it came into existence reads as follows:

> "எங்கள் தகப்பனார் உயிருடன் இருக்கும்போது தங்கள் தகப்பனார் எங்கள் தகப்பனாருக்கு எழுதிக் கொடுத்த கிரையத்தைப்பற்றி தங்கள் சார்பாக ஆட்சேபணை நடந்ததில் அடியில்கண்ட பூமிகளை எங்கள் தகப்பனார் அனுபவித்து லாபம் அடைந்திருப்பதை உத்தேசித்தும், விவகாரம் நடந்து தனக்கு நஷ்டமில்லாமலிருக்கும் பொருட்டும் எங்கள் குடும்ப நன்மையும் அக்கரையும் உத்தேசித்தும் பஞ்சாயத்தார் பைசல்படிக்கும் தாங்கள் 5 வருஷ கெடுவிற்குள் ரூபாய் 45,000-ம் செலுத்திவிடும் பட்சத்தில் அடியில் கண்ட சொத்துக்களைத் தங்களுக்கு கிரையம் செய்து கொடுப்பதாய் எங்கள் தகப்பனார் ஒப்புக்கொண்டிருப்பதை அனுசரித்து இப்போது தாங்கள் மேலே சொன்ன ரூபாய் 45,000ம் எங்களுக்குச் செலுத்துவதாய் ஒப்புக்கொண்டிருப்பதால் இந்தக் கிரையம் உங்களுக்குச் செய்து கொடுத்து விடுகிறோம்."

The learned Judge, while dealing with issue-2, in paragraph 4 of his judgment, has observed as follows:

> "It is hence clear that the panchayatdars had adjusted the equities between the two families of Doraiswami and Perumal as could be gathered from the recitals employed in Exhibit A-1, given a verdict in pursuance of which Exhibit A-1 came into existence. It appears to me that the object of compromise was to have peace or amity in these two families and that one family should not have any recourse against the other in future. Thus, the compromise effected by the panchayatdars stands on the same footing as that of a family settlement. I see no reason why such a compromise cannot be held to be binding on the defendants."

Finally he has concluded: "In this view, I find that the compromise is true, valid and binding on the defendants". From the above narration, it is clear that the sale under Exhibit A-1 is purely a family settlement so as to bring peace and amity between these two families, rather than a sale deed in a strict legal sense. Mr. G. Ramaswami, relying on a decision in *Narayan* v. *Bhau Rao*[1], would contend that the first defendant who was fully aware of the litigation in O.S. No. 178 of 1951 and when he chose to remain *ex parte,* cannot now put forth a plea that he is not bound by the decree in the said suit. In the above-cited decision it was held that where the vendor, who was impleaded as a defendant to a suit impeaching his title and claiming the vendee's eviction, remained *ex parte* though the question of title was a matter within his special knowledge, and therefore the vendee compromised the suit and subsequently filed a suit for damages against the vendor for breach of the covenant the said vendor was liable for damages, and he could not, without imputing had faith to the vendee, blame him for compromising the suit. In the action taken by Ramaswami Gounder in O.S. No. 178 of 1951, impeaching the sale deed executed by the first defendant herein on his behalf and on behalf of the then minor brother Ramaswami Goun-

1. A.I.R. 1956 Nag. 124.

der (plaintiff therein), it is the admitted case that the first defendant herein, who was one of the defendants therein, instead of supporting the sale in favour of Doraiswami Gounder, stood *ex parte*. Though the first defendant has valued the property covered under Exhibit A-1 at Rs. four lakhs or five lakhs, the sale consideration mentioned in Exhibit B-1 was Rs. 1,89,821-14-0. Mr. Kesava Iyengar would vehemently urge that the same properties are valued at Rs. 45,000 when they were sold to Doraiswami Gounder under Exhibit A-1, that this consideration is very inadequate and therefore it must be presumed that the sale deed has been brought about under fraud, undue influence and coercion. As we have discussed and concluded that the sale under Exhibit A-1 is more a deed of family arrangement than a sale deed in a strict legal sense, we are unable to agree with the learned counsel for the respondents that the sale is vitiated on the ground that it suffers from inadequate consideration.

12. It is very curious to note that the first defendant, who sets up the case that the sale was brought about by coercion, undue influence etc., has not chosen to come to the witness box and examine himself to substantiate his plea. This non-examination of the first defendant, in our view, is detrimental to his case and no weight therefore can be attached to the evidence of the other witnesses in respect of this plea. There cannot be any dispute on the proposition that when a party pleads to certain allegations, ordinarily he must go into the witness box and give his evidence in support of such plea, unless there are acceptable reasons for his not doing so. In the present case, no reason is assigned as to why the first defendant stood outside the witness box. Mr. Kesava Iyengar would contend that since the trial Judge has believed the evidence of D.W. 1, whose sister is married to the first defendant besides the first defendant being the maternal uncle of this witness, the non-examination of the first defendant should not be taken into consideration to dislodge the finding of the trial Judge. We are unable to agree with this contention, because there is no reason, as mentioned above, for the non-examination of the first defendant who has made the serious allegation against Doraiswami Gounder. When the first defendant himself is not prepared to come to the witness box and say that Exhibit A-1 was nominal, would it be safe to accept the evidence of D.W. 1 who is a third party and stranger to the document in spite of his being the brother-in-law of the first defendant, and brand the said document as a nominal one brought about under threat, coercion and undue influence? Further, the evidence of D.W. 1 is highly interested because of his close relationship with the first defendant. For the foregoing reasons, we set aside the finding of the lower Court that the sale deed Exhibit A-1 is vitiated by fraud, undue influence and coercion, and answer issue-3 in the negative in favour of the plaintiff.

13. It is contended by the first defendant that the case of the present plaintiff's husband in O.S. No. 178 of 1951 was that the sale under Exhibit B-1 was nominal and the resale to him in 1944 under Exhibit A-1 was also nominal and therefore on the basis of the above pleading, it is clear that there was no question of any guarantee of title or indemnity for the sale in the above circumstances. Exhibit B-2 is the certified copy of the statement of Doraiswami Gounder in O.S. No. 178 of 1951. Exhibit B-3 is the copy of his deposition in the said suit. No doubt, it is the case of Doraiswami in Exhibits B-2 and B-3 that Exhibit B-1 was a nominal document. Relying on the above statements in Exhibits B-2 and B-3 it was contended by Mr. Kesava Iyengar that these two documents would conclusively prove that Exhibit B-1 was a nominal sale and consequently Exhibit A-1 also is a nominal one and therefore there is no question of any covenant of title or indemnity. Learned counsel would also bring to the notice of this Court that as per paragraph 12 of the trial Court judgment learned counsel who appeared for the plaintiff in the lower Court, in the course of his argument, had conceded that though Exhibit B-1 cannot be

construed as a nominal document in its entirety, still it was a nominal document to some extent. We feel that this fact will not help the defendants, for the reasons that we shall presently advert to.

14. It is evident that Doraiswami Gounder had borrowed Rs. 30,000 each under Exhibits B-9 and B-11 in order to extricate himself from the criminal cases and financial difficulties and subsequently as Doraiswami Gounder owed a large sum to Perumal Gounder he executed Exhibit B-1 in favour of Perumal Gounder. In paragraph 8 of the written statement the first defendant has averred that in a matter of accounting between the estates of Perumal Gounder and Doraiswami Gounder, large sums were due to the former, that Doraiswami Gounder would not properly and honestly discharge the same and that therefore he had suffered enormously. Thus, it is to be noted that even the first defendant admits the fact that there were large sums due from Doraiswami Gounder to Perumal Gounder. Whether the debts owned by Doraiswami Gounder to Perumal Gounder had any comparison to the real value of the properties conveyed under Exhibit B-1 or not, the fact remains that Exhibit B-1 came into existence only in discharge of the amount due to Perumal Gounder. The fact that the value of the properties was much more than the debts owed by Doraiswami Gounder to Perumal Gounder would in fact probabilise the fact that there should have been an understanding between the parties that Perumal Gounder should reconvey the properties to Doraiswami Gounder on the latter discharging the above debts. It would transpire from the evidence of P.W. 2 in this case that there were disputes between Doraiswami Gounder and Perumal Gounder in respect of the properties and the income and they finally agreed that Doraiswami Gounder could take the properties on payment of Rs. 45,000 in a period of five years and that the said decision was arrived at in a panchayat in the presence of himself, one Muthuswami Gounder (the village Munsiff of that place) one Velliangiri Gounder, one Ananda Gounder (Karnam and Ramakkal, the step-mother of Doraiswami Gounder. It is his evidence that in pursuance of the said settlement. Exhibit A-1 was executed by the first defendant and certain panchayatdars had attested the same. According to this witness, the panchayatdar Velliangiri is dead and the other persons, *viz.*, Muthuswami Gounder and Ananda Gounder are unable to move on account of their old age. The criticism that is levelled against this witness is that he has not attested the document Exhibit A-1 and therefore his evidence that he was present at the time of the panchayat cannot be accepted. After going through the evidence of this witness, we do not find any reason to reject or discard the testimony of this witness. The fact that there was a panchayat cannot be disputed now since Exhibit A-1 itself contains a recital that the said document came into existence only as per the decision arrived at by the panchayatdars in order to settle the differences between Perumal Gounder and Doraiswami Gounder. The defendants rely on Exhibits B-2 and B-3, the statement and deposition of Doraiswami Gounder in O.S. No. 178 of 1951 for the purpose of showing that Doraiswami himself has stated that Exhibit A-1 was a nominal document. But it may be noted that in Exhibit B-2 Doraiswami Gounder had narrated the circumstances under which Exhibit A-1 came into existence. He has specifically mentioned therein that an arbitration took place in the presence of Velu Gounder, Muthuswami Gounder, Tirugnanasambandam Pillai and some of the respectable friends and well-wishers of his family. Similarly in the evidence of Doraiswami Gounder under Exhibit B-3, there is reference to the Panchayat that took place. Thus, there is positive proof that what all P.Ws. 1 and 2 have stated regarding the circumstances under which Exhibit A-1 came into existence, which corresponds with what is stated in Exhibits B-2 and B-3, has to be accepted. The finding of the learned trial Judge that he was unable to believe the evidence of P.Ws. 1 and 2 is, in our view, not correct. It is not the specific case of the defendants that no consideration passed under Exhibit A-1. In this

connection, we may point out that no allegation has been made in their written statement that the consideration under Exhibit A-1 was inadequate. Irrespective of the fact whether the consideration was adequate or inadequate, the fact remains that a sum of Rs. 45,000 was the consideration for the execution of the said document. The recital in Exhibit A-1 would show that Doraiswami Gounder was asked to discharge certain debts referred to therein and the fact that Doraiswami Gounder had fully paid and discharged the entire amount of Rs. 45,000 for obtaining the reconveyance of his properties, is also not disputed. The trial Judge himself has stated that he was inclined to believe that Exhibit A-1 is the outcome of the panchayat which settled the differences between these two families. When these circumstances and the evidence of the witnesses are taken together, we are left with an impression that Exhibit A-1 cannot be said to have been executed either as benami or nominal. At this juncture, it was pointed out by the counsel for the defendants that while Exhibit B-1 gives the value of the properties at more than Rs. 1,89,000. Exhibit A-1 which came into existence nearly 11 years afterwards, gives the value at Rs. 45,000 and contended that Exhibit A-1 should at any rate be considered as a nominal document. This argument cannot be accepted in the face of the clear recitals contained in Exhibit A-1 itself, which says that the panchayatdars, after taking into consideration the enjoyment of the properties and the income therefrom by Perumal Gounder for a considerable length of time, decided that Doraiswami Gounder should pay a sum of Rs. 45,000 to the first defendant and his brother. It is further stated in the said document that the vendee had agreed to discharge certain debts by Perumal Gounder amounting to Rs. 37,735-4-0, and to pay only a cash amount of Rs. 7,264-12-0 before the Registrar to the vendor. It is not the case of the defendants that there was no such debt payable by his father as recited in Exhibit A-1 or that those debts have not been discharged so far or that the cash amount of Rs. 7,264-12-0 was not received by him. The plaintiff herein also admits that the properties are very valuable and originally belonged to her husband and were taken by the first defendant's father previously under certain arrangements and had been agreed to be reconveyed to the plaintiff's husband Doraiswami Gounder, free of all encumbrances as a result of the panchayat. Therefore, the circumstances would only show that both Exhibits B-1 and A-1 really came into existence as a result of some settlement between Perumal Gounder and Doraiswami Gounder. We should like to sum up what has really happened in this way. Since there were large debts due by Doraiswami Gounder to Perumal Gounder amounting to Rs. 1,89,000 odd, Doraiswami Gounder agreed to convey his properties admittedly worth more than rupees three lakhs, to Perumal Gounder under Exhibit B-1, for the abovesaid lesser price of Rs. 1,89,000 odd, only with the specific understanding that Perumal Gounder would reconvey the properties to Doraiswami Gounder on the latter discharging the debts due to him. It may not be out of place to mention here that the total consideration mentioned in Exhibit B-1, *viz.*, Rs. 1,89,821-14-0, is made up of Rs. 86,780 said to have been due on Exhibit B-9, a sum of Rs. 99,256-8-0 due on Exhibit B-11 a further sum of Rs. 2,800 due to one Sri Ganesar Bank towards a chit, in which Perumal Gounder had stood as the guarantor, and a sum of Rs. 1,005-6-0 due towards E.P. No. 583 of 1933 in O.S. No. 9622 of 1924. The amount of Rs. 86,760 due under Exhibit B-9, is mentioned as having been arrived at as the balance of principal and interest after giving credit to some interest already paid. The next amount of Rs. 99,256-8-0 is mentioned as the principal and interest due under Exhibit B-11. Thus, the total amount of Rs. 1,86,016-8-0 is the principal and interest under Exhibits B-9 and B-11, out of which the principal is only Rs. 60,000 and the interest that accrued is Rs. 1,26,016-8-0. It is the admitted case of the defendants as per para. 7 of the written statement that the annual income from the lands in dispute would have been Rs. 40,000 to Rs. 50,000. What were the mate-

rials that the panchayatdars took into consideration at the time of the arbitration while arriving at Rs. 45,000 to be paid to the vendors, *viz.*, the sons of Perumal Gounder at the time of Exhibit A-1 we are not in a position to find out. But as seen from the recitals in Exhibit A-1, the arbitrators took into consideration the income from the lands while arriving at the figure of Rs. 45,000 as consideration towards Exhibit A-1. This fact shows that Exhibit B-1 was not a complete sale in the strict sense of the term enabling Perumal Gounder to enjoy the properties worth rupees four lakhs or more (Para. 7 of the written statement) and the income therefrom, absolutely for ever, but was subject to an arrangement for reconveyance back to Doraiswami Gounder. Therefore, the understanding at the time of Exhibit B-1 should have been that the income that would be derived by Perumal Gounder from the properties should be given credit to at the time of the reconveyance. Coming to the consideration under Exhibit A-1, it is seen from that document that the vendee, *viz.*, Doraiswami Gounder had agreed to discharge certain debts aggregating to Rs. 37,735-4-0 and to pay the balance before the Registrar. Under these circumstances, it cannot be said that the amount of Rs. 45,000 is the only consideration under Exhibit A-1, but in our view the real consideration was the said sum and the benefit derived by Perumal Gounder and the defendants by enjoying the properties for a considerable length of time. Thus, at the time when Exhibit A-1 came into existence, the arbitrators had taken into consideration the fact that Perumal Gounder was enjoying the suit properties and the income therefrom for a considerable length of time and then decided that the first defendant and his brother Ramaswami Gounder (sons of Perumal Gounder) should reconvey the properties to Doraiswami Gounder on receiving a sum of Rs. 45,000. Thus, the sale deed Exhibit A-1 was really a reconveyance executed by the first defendant and his brother in favour of Doraiswami Gounder in the above circumstances. Therefore, when both Exhibits B-1 and A-1 are considered together, the above argument of the learned counsel that there is difference in the value of the properties as recited in these two documents has no weight. For the above discussion, we hold on issue-4 that the sale deeds Exhibits A-1 and B-1 cannot be said to be nominal, but that they really came into existence as per the arrangement between the parties.

15. Then the next question under the same issue is whether the plaintiff is entitled to rely on the covenant of title, if any in the deed Exhibit A-1. It was contended on behalf of the defendants that inasmuch as Exhibit A-1 is a nominal sale, the relationship of vendor and vendee does not arise and consequently the plaintiff cannot rely on any breach of covenant of title and there would be no question of any covenant of title or indemnity for the same. We have already held that Exhibit A-1 was not a nominal one, but was a real reconveyance deed that came into existence between the parties. Therefore, we reject this contention. Therefore, we have only to find out whether there was any covenant of title or indemnity entered into therein and whether the defendants have committed breach thereof. The relevant recitals in Exhibit A-1 read thus:

> "ஷை சொத்தைப்பற்றி இனி எங்களுக்காவது எங்கள் வாரிசுகளுக்காவது யாதொரு பாத்தியமும் சுதந்திரமும் இல்லையென்றும் ஷை சொத்துக்களின் பேரில் யாதொரு வில்லங்கமும் இல்லையென்று உறுதியாய் சொல்லுகிறோம். அப்படியேதாவது ஏற்பட்டால் அதனால் ஏற்படும் சகல நஷ்டங்களுக்கும் நாங்களே ஜவாப்தாரியாக இருப்போமாகவும் என்று சம்மதித்து எழுதிவைத்த சிலாசாசனம்."

In the face of the above clear recitals, there cannot be any dispute that there was a covenant of title and indemnity on the part of the vendors. The only argument on behalf of the defendants is that Exhibit A-1 is a nominal document and therefore the above covenant or indemnity does not arise. According to the first defendant, he neither assured Doraiswami Gounder about the minor's title nor did he make himself liable for any breach of covenant for title and that

he had done no act whereby the property was incumbered or whereby he was hindered from transferring it to the purchaser Doraiswami Gounder. The material recital in Exhibit A-1 executed in favour of the benamidar of Doraiswami Gounder extracted above, can be construed as a covenant for title and indemnity on the part of the vendor. A covenant for title is a covenant that the vendor has a present title to convey. In every sale of land, there is an implied covenant for title as per section 55 (2) of the Transfer of Property Act, which reads as follows:

> "The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:
>
> Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.
>
> The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and "may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested."

The provisions of section 55 (1) enable the buyer before the completion of the sale to ascertain if the title offered is free from reasonable doubt. Once the buyer has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud. But, a covenant for title implied under section 55 (2) gives the buyer a further remedy in case of defects discovered after the conveyance. In the instant case, Doraiswami Gounder, at the time when he took the sale under Exhibit A-1 in the name of his benamidar, was aware of the fact that the sale was made on behalf of a minor also, *viz.*, the brother of the first defendant. Mr. G. Ramaswami, learned counsel for the appellant, would contend that even though the buyer, *viz.*, Doraiswami Gounder was aware of the minority of one of the executants at the time of the contract, he is entitled as per the above recitals, in Exhibit A-1, to hold the first defendant liable in damages Mr. Kesava Iyengar has submitted that the expression " வில்லங்கம். " used in Exhibit A-1 only refers to encumbrances like mortgages and other impediments, and that the seller in this case has done no act whereby the property is incumbered or whereby he was hindered from transferring it, and therefore the provisions of section 55 (2) would not be attracted to the provisions of the present case. Learned counsel would rely on the evidence of D.W. 1 who has deposed that the first defendant signed Exhibit A-1 only on the advice of Ramakkal, the step-mother of Doraiswami Gounder, and her promise of indemnity, if any wrong would take place afterwards, and argue that the recitals now relied upon by the plaintiff were embodied in Exhibit A-1 only on the advice of Ramakkal and not on the first defendant's own volition with knowledge of any defect in title. In support of his contention, he would rely on the decision of this Court in *Ramalinga Padayachi* v. *Natesa Padayachi*[1]. The facts of the said case were as follows:

> *M*, the owner of two survey numbers, sold one of the survey numbers to *A*, and the other to *B*. But, in the sale deeds executed by him he wrongly inserted the survey number of *B* in *A*'s sale deed, and the survey number of *A* in *B's deed*. In spite of this mistake, the parties were in enjoyment of their respective properties. *N*, who was relative of *A* coming to know of this mistake in the sale deed, persuaded *A* to sell him the survey number mentioned in his sale deed with the object of giving trouble to *B*. Having failed in his suit against *B* for declaration of title to that property and possession, *N* sued *A* for the expenses incurred by him in his suit against *B*.

On the above facts, it was held that section 55 (2) whereby there is an implied

1. (1967) 2 M.L.J. 166 : I.L.R. (1967) 1 Mad. 95: 80 L.W. 643: A.I.R. 1967 Mad. 461.

contract by the seller with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same, would be applicable only to cases where there is representation which the buyer accepted though he might have been aware of the defect but hoping that the defects would not affect him; but when the buyer himself knew full well that the seller had no title and was entering into the transaction with full knowledge of want of title, this implied warranty could not be invoked. The Court further held that though the validity of the contract itself was questionable as opposed to section 23 of the Contract Act as the object of the agreement itself was fraudulent involving injury to the person or property of another, the plaintiff, in the above circumstances, could not recover the expenses incurred by him in the prior litigation. The above decision relied upon by the learned counsel deals with a case where the buyer had knowledge that the seller had no title to the property and had deliberately purchased the litigation with the view of giving trouble to *B*, who was his enemy and he himself filed a suit against *B*, and having failed therein, had chosen to file the present suit for recovery of the expenses incurred by him in the said suit. In our view, the above decision is not at all applicable to the facts of the present case, because in the present case, though Doraiswami Gounder had knowledge of the minority of Ramaswami Gounder at the time when he took the sale deed under Exhibit A-1, in the name of the fourth defendant, he did not know that the first defendant was not selling the property for any family necessity binding on the minor Ramaswami Gounder. It is to be noted that Exhibit A-1 came into existence only afer the Panchayatdars had discussed the affairs of the parties. Regarding the evidence of D.W. 1 that it was on the advice and guarantee of Ramakkal, the first defendant executed Exhibit A-1, we are of opinion that this oral evidence, which is in direct contradiction to the clear and express recitals in Exhibit A-1 cannot be admitted in evidence as per section 92 of the Indian Evidence Act. The witness may give some interpretation of his own to the terms or recitals in a document and may give some reasons for embodying the recitals. But, when such terms or recitals by themselves are very clear and unambiguous, oral evidence contrary to them cannot be accepted. Regarding the construction of the terms of a document, it is the accepted principle that the intention of the parties is the determining factor and that intention has to be gathered from the document itself so as to find out the legal effect of the words used by the parties. If the words are express and clear, effect has to be given to them and any extraneous enquiry is ruled out. But if there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. The only explanation given by the first defendant in this case is that he was threatened by Doraiswami Gounder to execute the document Exhibit A-1. If it was so, the first defendant should have come forward with this case even in the suit filed by his brother in O.S. No. 178 of 1951. As we have already stated, the non-examination of the first defendant in this case would go a long way to show that the mere allegations made in the written statement have no value and no weight can be attached thereto. In the present document Exhibit A-1, the terms are express and unambiguous. Wherever a Court has to deal with a document which has been proved, its duty is to ascertain its real meaning and no evidence of any intention inconsistent with the plain meaning of the words used therein will be admitted to defeat the object of the language used.

16. We have to see whether at the time when Exhibit A-1 was executed the seller the first defendant had or had not made himself liable for any loss that might subsequently accrue to the purchaser for any defect of title to the properties. The conduct of the first defendant in remaining *ex parte* in O.S. No. 178 of 1951 would obviously show that he and Ramaswami Gounder (D.W. 4) had been acting in concert and collusion to the detriment of the case of Doraiswami Gounder. Therefore, the present version of the first defendant that

Exhibit A-1 was executed under threat, coercion etc., is an afterthought and cannot be true. For the above reasons, we hold that the first defendant clearly represented to Doraiswami Gounder, at the time when Exhibit A-1 was executed, that he and Ramaswami Gounder had full title in the properties and undertook to be responsible for any loss that might accrue to Doraiswami Gounder subsequently.

17. Regarding the contention of Mr. Kesava Iyengar that the word "வில்லங்கம்" means only encumbrances like mortgages and other impediments, we feel that this will not loom large since the first part of the representation contained in the above recitals in Exhibit A-1 is two-fold *viz*.,: (1) a representation made by the vendor (first defendant) that they (first defendant and Ramaswami Gounder) and their heirs would have no right or title to the properties in future; and (2) a representation made by them that there was no encumbrance (வில்லங்கம்) over the properties sold, while the second part of the representation deals with an undertaking given by the vendors that in case any such thing happened அப்படி ஏதாவது ஏற்பட்டால் they would stand guarantee for all the losses that the purchaser might incur. In our opinion, the above undertaking is in respect of both the above representations one regarding the defect in title and the other in respect of encumbrances. The first representation was that the first defendant and Ramaswami Gounder; then minor, or their heirs would have no further right or title in the properties. In respect of one half of the properties, belonging to the first defendant, there cannot be any dispute. But, regarding the other half belonging to Ramaswami Gounder, unless the sale was for family necessity binding on Ramaswami Gounder the said sale was entered into by the first defendant without himself having any title over it, but about which defect in title Doraiswami Gounder could not be said to have any knowledge. Since Doraiswami Gounder purchased the property only on the assurance given by the first defendant as per the above recitals, the first defendant would certainly be liable for the loss sustained by the plaintiff due to the claim made by Ramaswami Gounder in O.S. No. 178 of 1951. The second part of the undertaking reads: "அப்படியேதாவது ஏற்பட்டால் அதனுல் ஏற்படும் சகல நஷ்டங்களுக்கும் நாங்களே ஜவாப்தாரியாக இருப்போமாகவும்"

The words "ஏதாவது ஏற்பட்டால்" are wide enough to include all kinds of inconvenience or losses that would be sustained by the purchaser. This portion of the undertaking is not confined only to encumbrances such as mortgages and other impediments, but would include also every dispute which would cause loss to the vendee and thus it would amount to a specific covenant of indemnity to the vendee in case of his sustaining loss on account of any dispute arising in respect of the property. It is comprehensive enough to include contingencies where any cloud is cast on the title, followed by consequent litigation and loss to the purchaser. Therefore, the first defendant would certainly be liable for the losses incurred by the plaintiff due to the claim made by Ramaswami Gounder.

18. The facts of the present case are in fact on all fours with the facts in *Adhikesavan Naidu* v. *Gurunatha Chetti*[1]. In the said case, in a document Exhibit A-1 the vendor represented that there was necessity for selling the property in dispute. The purchaser, so far as the question lay between him and the vendor, was entitled to rely on that representation. A Full Bench of this Court held therein that the knowledge of the purchaser of the defect of title in his vendor did not affect his right to recover damages. It was further held that the manager of a joint Hindu family who agreed to sell immovable property belonging to himself and the minor members of the family was personally liable under section 73 of the Contract Act for damages for failure to perform the contract when it was found that it was not binding on the minor.

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1. (1917) I.L.R. 40 Mad. 338: 32 M.L.J. 180: 5 L.W. 425: A.I.R. 1918 Mad. 1315.

19. In *Mohamed Ali Sheriff* v. *Venkatapathi Raju*[1], a Bench of this Court held that mere knowledge on the part of the vendee of a defect in the title of the vendor would not by itself defeat the vendee's right on the basis of a covenant implied by section 55, clause (2) of the Transfer of Property Act.

20. In *Thammineni Paparao and others* v. *Dhavala Polinaidu and another*[2], the facts were: The plaintiff sued for damages for a breach of contract of covenant for title in respect of certain properties sold to the plaintiff by the defendant as it was later found that the property was subject to a maintenance decree with a charge in favour of a third party and in execution of which it was sold. On those facts, it was held that the fact that (the buyer knew of the defect in title of the seller before the purchase did not prevent him from suing for damages for breach of covenant for title).

21. Thus (it can be seen that even if the vendee had knowledge of the defect in title, the vendor would be liable in damages for the breach of the covenant of title. *A fortiori* therefore, in the present case where the vendee cannot be said to have any knowledge of the defect in title, he would be entitled to seek for recovery of the loss sustained by him, especially in the face of the clearly expressed covenant of title and covenant for freedom from incumbrances, contained in Exhibit A-1).

22. It is admitted that the plaintiff had been compelled to pay and had actually paid, as per the decree in O.S. No. 178 of 1951, a sum of Rs. 62,500 to Ramaswami Gounder. The first defendant and his minor sons are certainly liable to reimburse this amount to the plaintiff.

23. Since this is a suit for contribution based on indemnity, the plaintiff is certainly entitled to interest. The interest is claimed only at 5½ per cent. per annum. Hence, we set aside the finding of the lower Court on issue 7 and hold that the plaintiff is entitled to interest as claimed.

24. The finding of the lower Court on issue 8 that the suit is not barred by limitation is confirmed. Likewise, we confirm the findings on issues 2 and 5 in favour of the plaintiff.

25. In the result, we allow this appeal by setting aside the decree and judgment of the lower Court and instead passing a decree as prayed for with costs throughout.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

S. Palanivelu .. *Appellant**

v.

K. Veradammal .. *Respondent.*

Transfer of Property Act (IV of 1882), section 51—Trespasser on land putting up a construction—Nothing done by the owner to stop it—Acquiescence by owner—Trespasser not liable to be evicted—Owner to be compensated.

In the present case when the trespasser was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property, he could not have done these things in a hurry. It must have taken several months for the trespasser to complete the things which he had done on the property. The owner had not disclosed these things in his plaint for declaration and recovery of possession and had not prayed for a mandatory injunction for the removal of the structures put up by the trespasser on the trespassed portion of the suit property. The Court would therefore be justified in inferring acquiescence on the part of the owner. This is not a case for directing delivery of possession of the trespassed portion to the owner but a

1. 39 M.L.J. 449: 11 L.W. 537: A.I.R. 1920 Mad. 634.
2. (1945) 1 M.L.J. 323: 58 L.W. 121: A.I.R. 1945 Mad. 205.

*S.A. No. 1320 of 1974. 15th February, 1977

case where the owner has to be compensated in money for the value of the trespassed portion. [*Para.* 14.]

Cases referred to:—

Periakaruppan v. *Madurai Kajimartheru Pallivasal,* 1937 M.W.N. 533; *Fakiruddin Sahib* v. *Ramaswami Mudaliar,* (1965) 1 M.L.J. 167; *State* v. *Dugappa Bhandary,* 95 I.C. 789: A.I.R. 1926 Mad. 921; *R. S. Madanappa* v. *Chandramma,* (1966) 2 S.C.J. 310: (1965) 3 S.C.R. 283: A.I.R. 1965 S. C. 1812; *Cairncross* v. *Lorimer,* (1860) 3 Macq. 827; *Bishandas* v. *State of Punjab,* (1962) 2 S.C.R. 69: A.I.R. 1961 S. C. 1570; *A. C. C. Ltd.* v. *Ramakrishna,* I.L.R. (1965) 1 Mad. 237: 77 L.W. 629: A.I.R. 1965 Mad. 318.

Appeal against the decree of the City Civil Court, Madras, in Appellate Side No. 109 of 1973.

S. Navaneethakrishnan, for *T. R. Rajagopalan* and *T. R. Rajaraman,* for Appellant.

N. Sivamani, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant who lost in both the Courts below is the appellant. The respondent filed the suit for a declaration of her title to the portion of the land shaded blue and marked DEFG in the plaint plan and for recovery of possession thereof and also for a permanent injunction restraining the appellant from interfering with her possession and enjoyment of the remaining portion of the suit property. The entire suit property is a land measuring about 10 grounds and 1900 sq. ft. in R.S. No. 3173|14, Block No. 55, Nadavakkam tank area in Purasawalkam: The blue shaded portion marked D.E.F.G. is in the south-western corner of R.S. No. 3173|14. The respondent is the owner of R.S. No. 3173|14; as per the settlement deed Exhibit A-1, dated 11th June, 1962, executed by her mother Adiammal. She filed the suit alleging that the appellant trespassed into the D.E.F.G. portion of the suit land measuring 5 feet east-west and 63 feet north-south on 21st April, 1968 and that he was attempting to interfere with her possession and enjoyment of the remaining portion of the suit property.

2. The appellant is the owner of the western land bearing R.S. No. 3173|12, measuring 1 ground and 30 sq. ft. allotted to him by the Nammalwarpet Co-operative Housing Site Society. The defence was that as a member of the said society he was allotted that land and he had taken possession of the same and put up a brick built construction on the land allotted to him by the Society and is in undisputed possession of the property allotted to him by the Society. He denied that he had trespassed on any portion of the respondent's land and contended that the understanding between himself and the said Society is that the latter should execute a sale deed in his favour after he completes payment of the value of the site in instalments and that the Society is therefore a necessary party to the suit.

3. Both the Courts have found that there is encroachment by the appellant on a portion of land measuring 63 feet north-south and 4¼ feet east-west on the southern side and 4 feet on the northern side, which has been coloured in the Commissioner's plan Exhibit C-5 and that the said portion is part of R. S. No. 3175|14, belonging to the respondent. According to the Commissioner's report and plan the appellant had put up an open latrine, a major portion of which is in the coloured portion in Exhibit C-5, a portion of the appellant's main building, a portion of the platform, a major portion of a square well and a major portion of a stone used for washing clothes on the coloured portion in Exhibit C-5.

4. The trial Court declared the respondent's title to the coloured portion in Exhibit C-5 and granted a decree for delivery of vacant possession of that portion to the respondent after removal of the aforesaid superstructures within two months and also a permanent injunction restraining the appellant from interfering with the respondent's possession of the remaining portion in R.S. No. 3173|14 with costs. This decree has been confirmed by the learned Principal

Judge, City Civil Court, Madras, who dismissed the appeal with costs.

5. The concurrent findings of the Courts below that the coloured portion in the Commissioner's plan Exhibit C-5 forms part of R.S. No. 3173|14, belonging to the respondent and that the appellant has trespassed on that portion of the respondent's property, are on questions of fact which cannot be gone into in this second appeal. But the question whether in view of the fact that the respondent had not taken any effective steps when the appellant had constructed a portion of his main building and a portion of the open latrine and sunk the square well and put up a portion of the platform and a major portion of the stone used for washing clothes on the coloured portion in Exhibit C-5 and had not prayed for any mandatory injunction for the removal of these structures from the portion of the property, the possession whereof has been prayed for in the suit, she would be entitled to recover vacant possession of the small strip of land after demolishing and removing the structures and closing the well or would be entitled only to the market value of the land as compensation, is a question of law that arises for consideration in this second appeal.

6. The learned counsel for the respondent submitted at first that the question whether the respondent should not be compensated in money for the value of the land trespassed upon by the appellant should not be considered in the absence of a plea in the written statement. In that connection he relied upon a decision of Natesan, J., in *Fakiruddin Sahib* v. *Ramaswami Mudaliar*[1], where also there was no plea in the written statement filed on behalf of the first defendant as in the present case, claiming relief in respect of improvements and equities in his favour. Natesan, J., has observed in that judgment thus—

> "It will be apparent from these citations that to grant relief on the basis of equitable estoppel, not only should there be pleadings, but there should be evidence on which foundation can be laid for raising the plea. As already stated, there is no plea and naturally no evidence that has been let in. The learned Subordinate Judge has gone on presumptions and has overlooked that any act of the second defendant in excess of his powers would not bind the Thaika or trust. There is no pleading and no evidence that the trustee or muthavallis as a body made any representations or by their acquiescence allowed the first defendant to incur expenditure on the property. Again a religious trust like the Thaika in the present case will not be estopped by any act or conduct of the trustees committed in breach of trust. The lower appellate Court has not considered any of these aspects. The result, therefore, is that the relief which the learned Subordinate Judge has granted cannot stand."

This decision cannot be applied to the facts of the present case where as already stated the respondent has not whispered anything in the plaint about the existence of a portion of the main building of the appellant, a large portion of the well and other structures on the portion of the suit property which had been trespassed upon by the appellant. As already stated, the respondent has not prayed for any mandatory injunction for the removal of the said superstructure and other things put up on the trespassed portion by the appellant. The appellant appears to have proceeded on the basis that he was doing these acts only on his property. Even in the written statement his contention has been that the alleged trespassed portion forms part of R.S. No. 3173|12, which had been allotted to him by the Nammalwarpet Co-operative Housing Site Society of which he is a member. Therefore, it is not open to the learned counsel for the respondent to contend that the question of equity should not be considered in this case on the ground that no plea in that regard has been raised in the written statement.

7. The learned counsel for the respondent next contended that the equity can-

1. (1955) 1 M.L.J. 167.

not be granted under section 51 of the Transfer of Property Act to the appellant who is a trespasser. In this connection he relied upon some decisions. The first decision relied upon by him is of a Bench of this Court in *Secretary of State* v. *Dugappa Bhandary*[1], where the learned Judges have observed:

"The question then arises whether the defendants believed in good faith that they were absolutely entitled to the land. They are the heirs of Veeranna Chetti, the elder brother of Nandiappa Setti. Nandiappa Setti obtained possession of the land after Durgi Setti's death, knowing full well that he had no title thereto and that he was a mere trespasser........The original possession was gained by trespass and it can hardly be said that a person who enters upon land knowingly as a trespasser can *bona fide* believe that he is absolutely entitled thereto........ Negligence may in certain circumstances be consistent with honesty, but where title is obviously founded on possession which is knowingly obtained by trespass, it is impossible to hold that the trespasser honestly believed that he was the absolute owner .... I would, therefore, hold that the defendants are not legally entitled to the value of the improvements under section 51 of the Transfer of Property Act."

8. There was evidence in that case to show that the trespasser knew full well that he had no title to the property and that he was a mere trespasser. But in the present case as already stated the appellant appears to have put up a portion of the main building and a major portion of the well and to have done other acts in the trespassed portion of the suit property under the *bona fide* belief that that portion of the property was part of R.S. No. 3173/12, of which he was an allottee under the Nammalwarpet Co-operative Housing Site Society.

9. The next decision relied upon by the learned counsel for the respondent is the one in *Periakaruppan* v. *Madurai Kajimartheru Pallivasal*[1], where it is observed—

"The claim to compensation is based on section 51 of the Transfer of Property Act, but against this it is argued that none of the defendants had made any claim for compensation in their written statement. Nor was there any issue taken therein, and of course there was no finding. The learned counsel for the appellant is unable to produce any case similar to his in support of his claim and it seems to me that his contention cannot succeed because the defendants were clearly trespassers even assuming they entered upon the land in the *bona fide* belief that they had acquired good title. The word 'transferee' which appears in the section, in my opinion, cannot include a 'trespasser' and there is no case, so far as I am aware, where the benefit of the section has ever been extended to a 'trespasser'. There is moreover an allegation in the plaint that when the defendants were erecting or about to erect the houses the plaintiff objected and prevented them from doing so."

10. The respondent had sent the lawyer's notice, Exhibit A-4, dated 24th August, 1964 alleging that the appellant had encroached on 4 ft. of land and it was objected to by the respondent. The respondent further alleged in that notice that the appellant had removed the marking stones and put them in his house and had taken steps to put fencing on that encroached land. The appellant had sent the reply notice Exhibit A-5, dated 7th September, 1964, denying that there was any encroachment upon the respondent's land and saying that he was an allottee of the adjacent land by the Nammalwarpet Co-operative Housing Site Society and that the notice Exhibit A-4 should have been addressed to that Society and not to him. The appellant had further stated in that reply notice that the measurement of the respondent's land alone by the surveyor even if true was not the correct proce-

1. 95 I.C. 789: A.I.R. 1926 Mad. 921.

1. 1937 Mad. W.N. 533.

dure and that he should have measured the entire land and also the land belonging to the respondent. The appellant had denied that he had removed any stones or that he had taken up steps to put a fence on any portion of the land belonging to the respondent. But according to the plaint the trespass on the coloured portion in Exhibit C-5 was made on 21st April, 1968, long after the exchange of the notices Exhibits A-4 and A-5. There is no evidence to show that when the appellant was proceeding with the construction of his main building, the sinking of a well and putting up of other structures on the trespassed portion, the respondent raised any objection and drew the attention of the appellant that he was doing those things on a portion of the land belonging to her. Therefore, the aforesaid decision in *Periakaruppa* v. *Madurai Kajimartheru Pallivasal*[1], also does not help the respondent.

11. The learned counsel for the respondent relied upon the decision in *R. S. Madanappa* v. *Chandramma*[2], which does not appear to help the respondent but appears to help the appellant. There it has been observed—

> "In some decisions of the High Courts reference has been made to 'equitable 'estoppel" but we doubt whether the Court while determining whether the conduct of a particular party amounts to an estoppel, could travel beyond the provisions of section 115 of the Evidence Act......... The general principle of estoppel is stated thus by the Lord Chancellor in *Cairncross* v. *Lorimer*[3],—
>
> The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its being done and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence."

In that case the appellant was in enjoyment of his daughter's share in his wife's properties after his wife's death fully aware of the fact that it belonged to the daughters. It has been observed in those circumstances that no man who, knowing fully well that he has no title to property spends money on improving it can be permitted to deprive the original owner of his right to possession of the property except upon the payment for the improvements which were not effected with the consent of that person. In the present case as I have stated it could not be held that the appellant did the several acts which he had done on the trespassed portion of the suit property knowing full well that he was doing so on a property which does not form part of the land allotted to him by the Co-operative Society of which he is a member or that he was doing these acts on a land belonging to the respondent.

12. The learned counsel for the respondent next relied upon the decision of the Supreme Court in *Bishandas* v. *State of Punjab*[1], which in my opinion does not help either party. The admitted position in that case was that the land belonged to the State and that with the permission of the State one Ramjidas on behalf of the joint family firm of Faquirchand Bhagavandas built a dharmasala, a temple and a shop and managed the same during his lifetime and after his death the other members of the family conti-

1. 1937 Mad.W.N. 533.
2. (1966) 2 S.C.J. 310: (1965) 3 S.C.R. 283: A.I.R. 1965 S.C. 1812.
3. (1860) 3 Macqs. 827.

1. (1962) 2 S.C.R. 69: A.I.R. 1961 S.C. 1570

nued the management. In those circumstances it has been observed on the basis of some earlier decisions that a person who *bona fide* puts up constructions on land belonging to others with their permission would not be a trespasser and that the buildings so constructed would not vest in the owner of the land.

13. The learned counsel for the appellant relied upon the decision of a Bench of this Court in *A. C. C. Ltd.* v. *Ramakrishna*[1]. In that case, the appellant had secured from the Government a considerable extent of vacant land measuring about 420 acres including S. No. 950|1 which comprised 60 acres for the purpose of mining. Just south of S. No. 950|1 is S. No. 961|5 out of which the respondent had purchased from its owner one acre in the year 1950. For the purpose of his business he put up buildings on the land at a cost of nearly Rs. 17,000 commencing the work in 1950 and completing it in the next year. It was found that by putting up the buildings he had occupied 79 cents of the land in S. No. 950|1 which is Government poramboke. The learned Judges have observed—

> "The respondent did not perhaps know at that time that he was trespassing upon Government property. There was every reason for it. Nearly five years after the buildings were put up, the appellant sent a notice to the respondent complaining that in putting up the buildings the latter had trespassed into a portion of the property leased out to them by the Government. The respondent contested the title of the appellant to that extent of property. The former then instituted a suit out of which this appeal arises in 1958 for recovery of possession of 79 cents of land which had been occupied by the respondent and for a mandatory injunction directing him to remove the superstructure put up thereon. Both the Courts below found that the appellant had title to the property and they accordingly passed a decree for possession. The learned appellate Judge, however, realised that the appellant could have discovered the encroachment even at the time of construction of the building by the respondent. But he was of the view that having regard to the nature of the land and the circumstances under which the encroachment was noticed, the appellant could not be held to have acquiesced in the action of the defendants in putting up the buildings. One can easily see from the judgment of the lower appellate Court that but for the indifferent attitude adopted by the appellant the respondent could not have been encouraged to put up the buildings.
>
> It is not pretended that the appellant was not aware of the buildings coming up. Notwithstanding the view expressed by the appellate Judge, one can easily see that there must have been some kind of acquiescence on the part of the appellant while the respondent was putting up his buildings. The respondent feeling aggrieved by the judgment of the lower appellate Court filed a second appeal to this Court. Veeraswami, J., while affirming the title of the appellant to 79 cents of land held that in the circumstances, it would be unjust to pass a decree for possession of the property. The learned Judge accepted the finding of the lower Court that the appellants could, if they had cared, have found out in time that the respondent was trying to encroach upon their property and when they permitted the latter to complete their construction, it was evident that they were acquiescing in the act of he respondent. He therefore, considered that this was not a case for directing delivery of possession. Inasmuch as there was a prayer in the plaint for the grant of equitable relief by way of mandatory injunction, the learned Judge held that it would be competent for the Court to substitute in the place of the relief sought, a decree for compensation.

It will be clear from what we have stated above, that although an owner of property will have undoubted right to recover possession of it from a

1. I.L.R. (1965) 1 Mad. 237: 77 L.W. 629: A.I.R. 1965 Mad. 318.

trespasser albeit that the latter had put up a construction upon it, an exception does exist to such a rule when the owner is precluded by any conduct on his part from claiming possession. That is not really denying the owner his right to recover possession from the trespasser; but a rule of estoppel which prevents the owner from claiming the property to be his so far as the other side is concerned.

The learned Judge has, however, directed remand of the case for the purpose of ascertaining compensation payable to the appellant by the respondent. We are unable to see on what ground that direction can be justified. But the respondent has not complained against the order by filing any cross-appeal or memorandum of cross objections. Under the circumstances we leave the direction of the learned Judge as it stands".

14. In the present case also, as already stated, the respondent has not done anything when the appellant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property. The appellant could not have done these things in a hurry. They must have taken several months for the appellant to complete the things which he had done on the property. The respondent had not disclosed these things in the plaint and has not prayed for a mandatory injunction for the removal of the structures put up by the appellant on the trespassed portion of the suit property. The Court would therefore be justified in inferring acquiescence on the part of the respondent; I consider that this is not a case for directing delivery of possession of the trespassed portion to the respondent. But this is a case where the respondent has to be compensated in money for the value of the trespassed portion.

15. There is no evidence regarding the compensation to be paid to the respondent for the trespassed portion. The learned counsel for the parties are not able to agree on the matter. The matter has therefore to go back to the lower appellate Court for submission of a finding regarding the market value of the trespassed portion. The lower appellate Court will submit its finding within two months from the date of receipt of the records. The parties will be at liberty to adduce fresh evidence regarding the market value of the trespassed portion of the suit property. They will have ten days time for filing objections after the finding is received in this Court.

R.S. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan, J.*

J. N. Gulamali and others .. *Petitioners**

v.

Howrah Casting Company, Madras-1, and another .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (3) (a) (*iii*)—*Petition for eviction—Petitioners, owners of building—Petitioners carrying on business in the same building in a portion—Second petitioner carrying on business in some other goods in rented premises—Petition for eviction against tenants on the ground that the building was required for the business of the second petitioner—Petition whether maintainable—Eviction ordered—On appeal eviction order set aside—Revision preferred by landlords—Petition for eviction maintainable under section* 10 (3) (a) (*iii*).

The revision-petitioners were owners of 25, Errabalu Chetty Street, Madras. The respondents were tenants in various portions of the building. The second petitioner was carrying on business in pipe and sluice valves under the name of "International Sales Corporation" in Door No. 3|13, Vanniar Street, Madras, being rented premises. The revision petitioners carried on a different busi-

* C.R.P. Nos. 405, 406, 407 and 408 of 1977.
26*th August,* 1977.

ness at No. 25, Errabalu Shetty Street, Madras. Stating that the second petitioner *bona fide* required the portions in the occupation of the respondent herein for his own business purposes, petitions for eviction under section 10 (3) (*a*) (iii) of Tamil Nadu Act XVIII of 1960, were filed. The Rent Controller held that the requirement was *bona fide* and ordered eviction. Against this, the tenants preferred an appeal which was allowed. Against the appellate order revision petitions were filed by the landlords.

Held: The legal position would boil down to this; did the landlord seek eviction of the tenant from a non-residential building belonging to him with reference to a business, which he was carrying on in a rented premises? If that be so, section 10 (3) (*a*) (*iii*) would apply albeit he was carrying on another business either individually or in partnership in the non-residential premises owned by him. This interpretation is in accordance with the object of the Act, *viz.*, this was not a case of unreasonable eviction. It would be rather very reasonable for a landlord to have his business which was of a different nature run in the premises owned by him, rather than suffer the tenancy for all time to come merely because he happened to be a partner in some other business which was being carried on in a portion of a non-residential premises. In the case of Muslim co-sharers, it was not unknown that fractional shares were held by them and if the law was not to be interpreted in this manner, then it would affect the right of a landlord, which was certainly not the policy of the Act. [*Para.* 10.]

In the result, it was held that the eviction petitions were maintainable under section 10 (3) (*a*) (iii) of the Act and the finding of the lower appellate authority that section 10 (3) (*a*) (iii) would not apply was clearly an error of law. [*Para.* 11.]

Cases referred to:—

Easwaran Chettiar v. *Subbarayan*, (1970) 83 L.W. 696: A.I.R. 1971 Mad. 163; *V. R. Jayaraman* v. *N. S. Ramalingam*, (1973) T.L.N.J. 393; *Glamour Saree Museum* v. *Tamil Nadu Handloom Weavers Co-operative Society*, (1970) 83 L.W. 13: (1969) 2 M.L.J. 493.

Petitions under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act XXIII of 1973) praying the High Court to revise the order of the Court of Small Causes (II Judge), Madras, dated 30th October, 1976 and made in H.R.A. Nos. 195, 194, 193 and 192 of 1976 (H.R.C. Nos. 1040, 1039, 1038 and 1037 of 1974 on the file of the VI Judge, Court of Small Causes. Madras).

K. Parasaran, for *S. C. Shah* and *D. Vari*, for Petitioners.

Unnikrishnan, for Respondents.

The Court made the following

ORDER.—All these revision petitions arise out of a common judgment and the question of law that arises in these revision petitions is one and the same. It is enough to note the facts of one of the cases.

2. The revision petitioners are the owners of premises bearing Door No. 25, Errabalu Chetty Street, Madras-1. The respondents are tenants in various portions of the said building. The second petitioner (Abidali) in all these petitions is carrying on business in pipes and sluice valves under the name and style of 'International Sales Corporation', in Door No. 3|13, Vanniar Street, Madras. It is a rented premises. It is admitted that the business carried on by the revision petitioners in No. 25, Errabalu Chetty Street, Madras, is a *different business* than the one which the second petitioner is carrying on at No. 3|13, Vanniar Street. Stating that the second petitioner *bona fide* required the portions in the occupation of the respondents herein for his own business purposes he filed the petitions before the Rent Controller under section 10 (3) (*a*) (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act). By way of abundant caution, they also

filed petitions under section 10 (3) (*c*) of the Act for additional accommodation should the Court hold the other applications were not maintainable. The Rent Controller held that the requirement of the premises for the occupation of the second petitioner was *bona fide* and ordered eviction under section 10 (3) (*a*) (iii) of the Act. It was further held by him that section 10 (3) (*c*) of the Act was not applicable.

3. Aggrieved by that order the tenants preferred appeals to the Court of Small Causes, Madras (Second Judge). The Appellate Authority was of the view that in so far as the second petitioner is a partner in the business called 'Universal Hardware Mart' which is being carried on in Door No. 25, Errabalu Chetty Street, Madras, it was not open to him to get an eviction under section 10 (3) (*a*) (iii) of the Act. He also held that the application under section 10 (3) (*c*) of the Act was not maintainable. It is under these circumstances the revision petitions have arisen.

4. Mr. K. Parasaran, learned counsel for the revision petitioners urges with considerable force that the business carried on at 3|13, Vanniar Street, is an entirely different business than the one which is carried on by the second petitioner at No. 25, Errabalu Chetty Street, in partnership with other revision petitioners. In such a case section 10 (3) (*a*) (iii) woud apply. So long as these businesses are different, for that business it would be open to the second petitioner to seek eviction of the tenant from the petition-mentioned premises and his rights cannot be negatived because he happens to be a partner in the business carried on at No. 25, Errabalu Chetty Street. That would be against the spirit of the Act. In fact, a Division Bench of this Court in *Easwaran Chettiar* v. *Subbarayan*[1], in dealing with a case of same business being carried on by a landlord in two different premises held that the word 'a business' occurring in section 10 (3) (*a*) (iii) would mean any business. This was in fact the ruling laid down by a single Judge earlier. But a division Bench in C.R.P. No. 2343 of 1971 dated 2nd May, 1973 (shortly reported in *V. R. Jayaraman* v. *N. S. Ramalingam*[1]) clarified the position and held if there are two different businesses and with reference to one of the businesses that is carried on by the landlord in a rented premises, if he wants to occupy a portion of that non-residential building which belongs to him, such an application would be maintainable under section 10 (3) (*a*) (iii). That ruling would govern this case. In this view, order of the Appellate Authority is liable to be set aside.

5. Mr. M. R. Narayanaswamy, learned counsel for the tenant supports the order of the Appellate Authority and relies upon a decision of Veeraswami, J., as he then was, reported in *Glamour Saree Museum* v. *Tamil Nadu Handloom Weavers Co-operative Society*.[2] In that case the learned Judge categorically laid down the phrase 'a business' in the provision as reference to any business and not each of the businesses. Therefore, the application under section 10 (3) (*a*) (iii) is not maintainable. If according to the learned counsel the test is applied with reference to each of the businesses it will be adding to the legislation and not interpreting that section. Having regard to the controversy, I think it will be useful to refer to the object of the Act, which says:—

> "An Act to amend and consolidate the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Tamil Nadu".

The preamble also reads in similar terms. Therefore, what is sought to be prevented is unreasonable eviction. If this is kept in the background, in my view much of the difficulties can be avoided. Section 10 (3) (*a*) (iii) of

1. (1970) 83 L.W 696: A.I.R. 1971 Mad. 163.

1. 1973 T.L.N.J. 393.
2. (1970) 83 L.W. 13; (1969) 2 M.L.J. 493.

the Act which is relevant for our purpose reads:—

"in case it is any other non-residential building, if the landlord is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own".

6. How Mr. M. R. Narayanaswamy wants me to read this section is, if a landlord or any member of the family is occupying for the purpose of a business (though different) in non-residential building, he will go out of the purview of the section. In other words according to him, the test is: (1) whether he carries on business; (2) in a non-residential building. In the instant case, so far as the second petitioner carries on business as a co-owner along with the other petitioners he would fall out of the purview of this section. He also relies on for this contention, a judgment of Veeraswami, J., as he then was, reported in *Glamour Saree Museum* v. *Tamil Nadu Handloom Weavers Co-operative Society*[1]. The learned Judge held therein at page 14:—

"What the sub-section provides is that the carrying on of a business by the landlord in his own non-residential buildings is the test and that does not in my view, mean each business or a particular business. The phrase, 'a business' in the provision has reference to any business and not each of the business".

7. However, in *Easwaran Chettiar* v. *Subbarayan*[2], a Division Bench of this Court held:—

"The primordial requisite or the condition precedent which would enable a landlord to seek an order under section 10 (3) (*a*) (iii) is that he should not be in occupation of a non-residential building of his own in which he is carrying on a business. The letter 'a' in section 10 (3) (*a*) (iii) would mean "any", that would be its plain meaning. The fact that the premises owned and occupied by him does not subserve his business interests and that it is not convenient for him to occupy the same for purposes of a business which he is carrying on....is an irrelevant factor and if that is taken into consideration, we are of the view, that while interpreting the section we would be making law and not declaring law. The law as it stands says that the landlord is interdicted from seeking a non-residential building of his in the occupation of his tenant if and when he is already in such a non-residential building of his own in which he is carrying on a business. We have already prefaced that hardship and inconvenience caused in declaring the law as it stands cannot be noticed by Court; for it is the exclusive prerogative of the Legislature to amend such hardships and to avoid the same. In the instant case the finding of the Court below is that the respondent is carrying on both wholesale and retail oil business in a building of his own and he is seeking for eviction of the tenant in another non-residential building belonging to him on the ground that he wants to expand his business or set up a new business. However, *bona fide* the intention of the landlord may be and whatever hardship might result by reason of the application of the prevailing law, we are unable to agree with the contention of the learned counsel for the respondent that he would be entitled to an order for eviction, for he deserves it".

8. It requires to be noted at this stage that the law which came to be laid down by the Division Bench was with reference to the oil business. In other words it was in respect of the same business except that one was wholesale and the other was retail. The reason why I mention this is a distinction has been made, if I may say so with great respect, rightly between distinct businesses.

9. In C.R.P. No. 2343 of 1971 dated 2nd May, 1973 a Division Bench of this Court in dealing with a situation like the one on hand held;—

1. (1970) 83 L.W. 13: (1969) 2 M.L.J. 493.
2. (1970) 83 L.W. 696; A.I.R. 1971 Mad. 163.

"But the Court is of the opinion that the fact that the petitioner is carrying on business in jewellery in a building of his own does not really disentitle him to relief under section 10 (3) (*a*) (iii) of the Act, though in this case the petitioner has to fail on other grounds. The Appellate Authority and the Revisional Authority have not correctly understood the purport and scope of the decision in *Glamour Saree Museum* v. *Tamil Nadu Handloom Weavers Co-operative Society Ltd.*[1]. The observation of the learned Judge "what the sub-section provides is that the carrying on of a business by a landlord in his own non-residential building is the test, and that, does not in the view of the Court, mean each business or a particular business. The phrase 'a business' in the provision has reference to any business and not each of the businesses has to be understood in that context. The learned Judge held that if the landlord was carrying on Co-optex sarees business in the Pantheon Road Building which is its own, it will not be entitled to an order of eviction. That is so because on the plain meaning of section 10 (3) (*a*) (iii) a landlord who is carrying on a particular business in a building of his own would not be entitled to relief under the provision in respect of the same business. But if the landlord is carrying on a different business in another building which is not his own, there is nothing in the section which debars him to have recourse to the provision in that section in respect of that business even though he might be carrying on another business in a building of his own. In other words if a landlord is carrying on two different businesses, one say in jewellery in a building of his own, and the other say, in timber in a rented building he would be entitled to relief under section 10 (3) (*a*) (iii) for shifting the timber business to a third building which is his own ...... but in the occupation of a tenant. In such a case the timber business of the landlord in the rented building satisfied the clause 'a business which he ...... is carrying on' occurring in the above section. This is in accord with the view taken by a Division Bench of this Court in C.M.P. No. 4164 of 1950. In the present case, the landlord is carrying on business in jewellery in a building of his own. If the business Ranga Medicals which is being carried on in 61, Long Bazaar, a rented building is a business of the landlord himself the Court sees no ground at all to say the landlord would not be entitled to apply for eviction of a tenant from the premises in question under section 10 (3) (*a*) (iii)".

10. The observation of a Division Bench of this Court in *Easwaran Chettiar's Case*[2], that the letter 'a' in section 10 (3) (*a*) (iii) would mean "any" that that would be its plain meaning has also to be understood on the facts of that case. If the landlord is carrying on the particular business in his own building, he cannot be heard to say, that he required the premises in the occupation of the tenant for shifting that business. The mere fact that in the building belonging to the landlord not only the particular business but another business was also being carried on would not mean that the landlord would be entitled to relief under section 10 (3) (*a*) (iii) of the Act. But on a plain meaning of the said provision, if the landlord is carrying on business in a building not his own, he would certainly be entitled to relief under the said provision albeit he is carrying on another business in a different building which is his own. The only limitation is the claim of the landlord should be *bona fide* and under the said provision the landlord can obtain possession of only one building.

The legal position will boil down to this: does the landlord seek eviction of a tenant from a non-residential building belonging to him with reference to a business, which he is carrying in a rent-

1. (1969) 2 M.L.J. 498: (1970) 83 L.W. 13.

1. (1950) 1 M.L.J. (N.R.C.) p. 7.
2. (1970) 83 L.W. 696: A.I.R. 1977 Mad. 163.

ed' premises. If that be so, section 10 (3). (a) (iii) would apply albeit he is carrying on *another business* either individually or in partnership in the non-residential premises owned by him. This interpretation is in accordance with the object of the Act, *viz.*, this is not a case of unreasonable eviction. It will be rather very reasonable for a landlord to have his business which is of a different nature in the premises owned by him, rather than suffer the tenancy for all time to come merely because he happens to be a partner in some other business which is being carried on in a portion of that non-residential premises. In the case of Muslim co-sharers it is not unknown that fractional shares are held by them and if the law is not to be interpreted in this manner, then it would affect the right of a landlord which is certainly not the policy of the Act. It is not a case of legislation at all. It is only a case of interpreting the law so as to avoid unreasonable eviction.

11. In the result, I hold the eviction petitions are maintainable under section 10 (3) (a) (iii) of the Act and therefore the finding of the lower Appellate Authority that section 10 (3) (a) (iii) will not apply is clearly an error of law. However, I do not disturb the finding that the applications cannot fall under section 10 (3). (c) of the Act.

12. Therefore C.R.P. Nos. 405 and 407 of 1977, which arise out of eviction petitions under section 10 (3) (c) of the Act will have to be dismissed and are accordingly dismissed. The other revision petitions *viz.*, C.R.P. Nos. 406 and 408 of 1977 will stand allowed and the matter is remitted to the lower appellate Court for consideration on merits on the evidence on record. No costs. It will be open to the parties to let in such evidence as they may desire and the learned appellate authority will consider the need therefor, in his discretion. The appellate authority is directed to dispose of the appeals on or before 30th of November, 1977.

Petitions 406 and 408 allowed.
Petitions 405 and 407 dismissed.

S.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*P. S. Kailasam, CJ.* and *V. Balasubrahmanyan, J.*

Padmavathi and Bheema Raja .. *Petitioners**

v.

The State of Tamil Nadu, represented by its Secretary, Education Department, Madras-9 and The Special Tahsildar for Land Acquisition, Town Planning, Coimbatore .. *Respondents.*

(A) *Land Acquisition Act (I of* 1894), *sections* 4, 5 *and* 5(*A*) — *Compulsory acquisition of lands by Government for public purpose — Preliminary notification published in Official Gazette—Display of notification in the locality—Individual notices not served on the persons interested in the land—Land acquisition proceedings not invalid.*

(B) *Madras Revenue Boards Standing Orders, B.S.O.* 90 *G.O. No.* 196, *Revenue, dated 6th February,* 1926—*Board of Revenue Regulations (I of* 1803) — *Powers of Board under the Land Acquisition Act—Superintendence —Extent and nature of.*

(C) *Natural justice principles—Applicability in interpretation of statutes.*

(D) *Land Acquisition Act (I of* 1894), *section* 45 *read with sections* 9 *and* 10—*Award enquiry—Service of individual notices—Persons having more than one ordinary residence—Service at the ordinary residence of the person good service*

Section 4 (1) of the Land Acquisition Act deals with the genesis of the proceedings for compulsory acquisition. The appropriate Government must first be satisfied that any land in a given locality is needed, actually or potentially, for a public purpose. If the Government is so satisfied, then a notification to that effect

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*W.P. Nos. 746 and 889 of 1972.

15th December, 1976.

has to be published in the Gazette. The section does not require that even for the initial formation of its opinion that the land is needed for a public purpose, the Government should send notices to the owners of the land, convene them, and listen to their objections. The satisfaction of the Government both as to the needs of public purpose and as to the particular land that would satisfy those needs is purely a subjective satisfaction. The Gazette notification is to be issued solely on the basis of this subjective opinion of the Government. What should follow the gazette notification is also laid down in the section. It provides that the Collector should cause public notice of the gist of the Government's notification in convenient places in the locality. The marginal note to the section sums up the procedure correctly when it refers to "publication of preliminary notification". Public notice by the Collector is mandatory, as might be seen from the use of the word "shall" in the section. He would be failing in his duty if he did not cause public notice to be displayed in convenient places in the locality. Failure or omission to comply with this step in the procedure for acquisition would invalidate subsequent proceedings, and any person aggrieved would have a right to move the Court under Article 226 of the Constitution to have them quashed. [*Para.* 11.]

Sub-section (2) of section 4 deals with the next step in the procedure for compulsory acquisition, and it begins with these words, "Thereupon, it shall be lawful for any officer, etc". These words are an indication that the issue of gazette notification and publicising of the gazette notification by display of public notices in the locality are both intended to exhaust the process of notice-giving at the preliminary stage. There are other indications, too, in section 4 (2) to the same effect. The sub-section provides that on the publication of the Government's preliminary notification in the gazette and the Collector's public notices in the locality, the Government may authorise any of its officers to enter upon and survey the lands in the locality and to do any acts necessary to ascertain whether the land notified for acquisition for the avowed public purpose is suitable for that purpose. The Government might, under this sub-section authorise its officers to enter any building or dwelling house or any enclosed Court or garden attached thereto. But the proviso to section 4 (2) clearly enacts that this power of entry of residential buildings, etc., cannot be exercised by the officers without previously giving the occupier of the premises at least seven days notice in writing of his intention to do so. The reference to notice in this proviso is specific and detailed. It requires that the notice should be in writing, it should be addressed to the occupier, it should be served on him personally, and it should give him seven days' time. The proviso, no doubt, dispenses with notice as unnecessary wherever the occupier himself consents to the inspection of the premises. But, short of obtaining the occupier's consent, the power of entry can be exercised by the officers authorised in that behalf only after service of individual notices on the occupier. Under section 45 (1), "in the case of a notice under section 4" it shall be effected by "the officer therein mentioned" by delivering or tendering a copy thereof signed by him to the person intended to be served with the notice. Section 45 (1) in terms, only refers to "section 4", but it is obvious that this reference cannot appertain to any notice under sub-section (1) of that section; it can only refer to the notice of intention to enter the premises issued to the owner or occupier of a residential house by officers generally or specially authorised in that behalf by the Government, in connection with the proceedings contemplated by section 4 (2) and the proviso thereto. [*Para.* 12.]

On the terms of section 4 (1), therefore, there can be no scope for assuming that the Collector's statutory obligation to publicise the Government's preliminary gazette notification for acquisition extends to the giving of individual notices to the persons interested in the lands notified for acquisition. [*Para.* 13.]

Section 5-A, no doubt, confers on the persons interested a right to object to the

acquisition, but under sub-section (1) this right has to be exercised by them within 30 days after the preliminary notification under section 4 (1). The prescription of a time-limit in section 5-A (1) and its computation as of a fixed period after the notification under section 4 (1) clearly show that the provision deals with a stage subsequent to the stage of notification of the acquisition. The right to object, under section 5-A, begins to operate from the date of the notification. The person objecting may file his objection on the very next day after the gazette publication or on any day falling within a period of 30 days. By that time, the Collector may or may not have given public notices in prominent places in the locality in accordance with section 4 (1). Irrespective of the date of his public notice the Collector has to entertain the objections provided they are filed within 30 days after the gazette publication. This, again, shows that the right conferred by section 5-A (1) has nothing whatever to do with the mechanics of notice which the statute contemplates for publicising the notification of the government under section 4 (1). Under section 5-A (1), in content as well as in chronology, is a bare right to object to the acquisition. The section does not deal with any right, properly so called, to notice of the acquisition itself.

[*Para.* 16.]

Under the scheme of section 5-A, the question of sending individual notices to persons hardly arises until the proceedings reach a stage when objections are actually lodged with the Collector and an inquiry into these objections has to be gone into by him. Besides, even at the stage when the Collector has taken the objections on file, his obligation under section 5-A (2) to send notices of inquiry does not extend to all persons interested in the land, but is is limited only to those of them who had lodged their objections before the Collector within 30 days of the gazette notification. It follows, therefore, that for the purpose of seeing whether or not the initial notices of acquisition should be served individually on all the persons interested in the land, we would not have to be searching the provisions of section 5-A or of the relevant rules bearing on section 5-A, but have to look only to section 4 (1) and rule 1 for the purpose.

[*Para.* 27.]

The Board of Revenue at Madras is a statutory authority whose powers and functions were defined for the first time in statutory form in the Madras Board of Revenue Regulation (I of 1803) passed by the Governor-General-in-Council on 1st January, 1803. It appears from the preamble to the Regulation that prior to the establishment of Courts of judicature in the Presidency for administering justice in all cases, civil and criminal, it was usual for the Board of Revenue to exercise judicial authority in the determination of certain cases of a civil nature by way of appeals from the Collectors who were entrusted with the administration of revenue and dispensation of justice in their respective districts. The above provisions make it clear that the Board of Revenue is only concerned with the superintendence of the revenue of the State from whatever source derived. Its powers of superintendence and control are limited to the persons employed in the executive administration of public revenue, and even those powers only relate to the control of the executive administration of revenue under the appropriate regulations. Even its disciplinary jurisdiction is confined strictly to the subordinate officers of the revenue.

[*Paras.* 35, 36.]

The Land Acquisition Act is not only a special enactment but a complete code in itself. Board's Standing Oorder No. 90 relating to acquisition of land for public purposes has no statutory sanction.

[*Para.* 38.]

The Land Acquisition Act is a complete code in itself. Hence, wherever in the context of particular proceedings under the Act the Legislature has not provided for individual notices, that must be regarded not as an accidental or inadvertent omission on the part of the Legislature to provide for full procedure, which omission may be supplied by grafting

the principles of natural justice to the relevant provisions, but as a deliberate decision of the Legislature not to import the principles of natural justice, to the fullest extent, into those provisions. The question of importing rules of natural justice would only arise where the statutory provision can be held to have left gaps that are capable of being filled by the rules of natural justice, without doing violence to the legislative intentions deducible from the terms of the relevant statutory provision. [*Paras*. 46 & 48.]

The necessity for issuing individual notices to persons aggrieved promoted by considerations of natural justice cannot be implied in the provisions of sections 4 (1) and 5 (A) of the Land Acquisition Act. [*Para*. 54.]

Law does not say that a person can have only one ordinary residence. A person can have more than one ordinary residence, and service of notice at any one of the residences would be good service under section 9 (3). [*Para*. 66.]

View of Ramaprasada Rao, J., in *Palani Gounder* v. *Land Acquisition Officer*, W.P. No. 1686 of 1971 as to need for giving individual notice in every case to aggrieved person as implicit in section 5-A not followed. View of Palaniswami, J., in *Easwara Pillai* v. *State of Tamil Nadu*, (1972) 1 M.L.J. 92: 85 L.W. 894; not approved.

Cases referred to:—

Ghousia Begum v. *Union Territory, Pondicherry*, A.I.R. 1975 Mad. 345; *Easwara Pillai* v. *State of Tamil Nadu*, (1972) 1 M.L.J. 92: 85 L.W. 894; *State of Mysore* v. *V. K. Kangan*, (1976) 2 S.C.C. 895: (1976) 1 S.C.R. 369: A.I.R. 1975 S. C. 2190; *Ajit Singh* v. *State*, 1972 Mah.L.J. 103: 74 Bom.L.R. 345: I.L.R. (1972) Bom. 1147: A.I.R. 1972 Bom. 177; *Duraiswami Mudaliar* v. *Secretary of State for India in Council*, (1939) 2 M.L.J. 6: 49 L.W. 773: A.I.R. 1939 Mad. 648; *Nagarathnammal* v. *Ibrahim*, (1955) 2 M.L.J. 49 (F.B.): 68 L. W. 206: I.L.R. (1955) Mad. 460: A. I.R. 1955 Mad. 305; *Union of India* v. *Joseph*, (1973) 2 S.C.R. 752: (1974) 2 S.C.J. 276; A.I.R. 1973 S. C. 303; *A. K. Kraipak* v. *Union of India*, (1970) 1 S.C.J. 381: (1970) 1 S.C.R. 457: A.I.R. 1970 S.C. 150; *State of Gujarat* v. *Ambalal*, (1976) 3 S.C.C. 495: A.I.R. 1976 S.C. 2002; *Brettinghaum-Moore* v. *Municipality of Ieonarrds*, (1969) 121 C.L.R. 509; *Furnell* v. *Whangrei High School Board*, (1973) 2 W.L.R. 927; *Wisemann* v. *Barreman*, (1971) A.C. 297; *Pearlbeeg* v. *Vorty*, (1972) 1 W.L.R. 534; *Director of Public Prosecutions* v. *Bhagwan*, (1970) 3 All E.R. 97.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the respective affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* in both petitions calling for the records of the respondents comprised in G.O.R. No. 595, Education, dated 26th March, 1970 and G.O.R. No. 680, Education, dated 26th March, 1971 and quash the said orders, dated 26th March, 1970 and 26th March, 1971.

M. Venkatachalapathy, for Petitioner in Writ Petition No. 746 of 1972.

R. Krishnamoorthi, D. Raju and *A. R. Lakshmanan*, for Petitioner in Writ Petition No. 889 of 1972.

C. Chinnaswami, for Government Pleader in both the writ petitions.

The following Order of reference was made by

Koshal, J.—By this order I shall dispose of two petitions under Article 226 of the Constitution of India, *viz.*, Writ Petitions Nos. 746 and 889 of 1972, in each of which there is a single petitioner who challenges the acquisition of his land situated in Coimbatore town. The acquisition proceedings were initiated by a notification, dated the 15th of April, 1970 issued under sub-section (1) of section 4 of the Land Acquisition Act (hereinafter referred to as the Act). Notices of the proposed acquisition were published in conformity with rule (1) of the rules framed by the Tamil Nadu Government under section 55 (1) of the Act, but no notice thereof was served individually on either of the petitioners and it is contended on their behalf that the

acquisition proceedings are void for want of such notices which it was incumbent on the Collector to serve as per instruction (1) contained in paragraph 9 of Standing Order 90 issued by the Board of Revenue. That instruction states:

"(1) Besides publishing the notice as prescribed in rule 1 of the Appendix I, the Collector should see that individual notices are served as far as possible on every person known or believed to be interested in the land and to be acquired in the manner prescribed by sub-sections (3) and (4) of section 9 of the Land Acquisition Act (I of 1894). In cases in which it has been impossible at the time of the issue of the notification under section 4 (1) so to describe all or any of the lands to be acquired that the persons interested therein can understand that their lands are likely to be needed for the public purpose, the individual notice should be issued as soon as the necessary details are available allowing 15 days thereafter for the presentation of objections to the acquisition."

This instruction was considered in *Easwara Pillai* v. *State of Tamil Nadu*[1], by Palaniswamy, J., who laid down the following two propositions in regard to it:

(1) The instruction has statutory force and is not merely an executive instruction in the sense that it emanates from a superior to a subordinate official.

(2) Even if it is regarded as an executive instruction it is based on the principle of natural justice that nobody shall be condemned and for that reason also it is binding on the acquisition authorities.

2. Attention of Palaniswamy, J., was drawn to *Associated Equipment Services* v. *State of Madras*[2], decided by Ramakrishnan, J., and *Meclec Nutriments and Pharmaceuticals Ltd.* v. *State of Madras*[1], decided by Kailasam, J. (as his Lordship then was), in both of which it was held that the Act did not prescribe as an obligatory direction that notice be given for an enquiry under section 5-A thereof to particular persons individually. Each one of these cases was distinguished by Palaniswamy, J., on the ground that the instruction above extracted was not brought to the notice of the learned Judge who decided the same. As it is, learned counsel for the State of Tamil Nadu and the Special Tahsildar for Land Acquisition, Coimbatore who are the two respondents before me, has contended that *Easwara Pillai's case*[2], was not correctly decided and that the instruction above extracted is neither statutory in character nor liable to be enforced in writ proceedings on the basis of principles of natural justice. Reliance for this contention is placed on a Bench decision of this Court in *Ghousia Begum* v. *Union Territory, Pondicherry*[3], which repeats the dictum given by Ramakrishnan, J., and Kailasam, J., in the cases above cited, although no reference therein also is made to the said instruction.

3. After hearing learned counsel for the parties at some length I have begun to entertain doubts (and I say so with the utmost respect to Palaniswamy, J.) about the correctness of the decision in *Easwara Pillai's case*[2], although I have not formed any definite opinion in that behalf. The points raised are not free from difficulty and are of great general importance. I consider the cases before me, therefore, to be fit ones for decision by a larger Bench and direct that their records be laid before my lord the Chief Justice with a request that such a Bench may be constituted.

S. Ramalingam, for *S. Jagadeesan* and *M. Venkatachalapathy,* for Petitioner in Writ Petition No. 746 of 1972.

R. Krishnamoorthy, D. Raju and *A. R. Lakshmanan,* for Petitioner in Writ Petition No. 889 of 1972.

1. (1972) 1 M.L.J. 92: 85 L.W. 894.
2. W.P. No. 1734 of 1964.

1. W.P. No. 1846 of 1965.
2. (1972) 1 M.L.J. 92: 85 L.W. 894.
3. A.I.R. 1975 Mad. 345.

B. Ramamurthi, for Government Pleader on behalf of the Respondents in both the writ petitions on 23rd November, 1976 and of the Government Pleader on behalf of the Respondents in both the writ petition on 24th November, 1976.

The Order of the Court was pronounced by

Balasubrahmanyan, J.—These two writ petitions come before us on a reference by Koshal, J. Each is filed by a different individual. But both raise a common question of law under the Land Acquisition Act, 1894.

5. The writ petitioners are owners of fractional interests in two pieces of land in Coimbatore Town. Those lands were notified by the State Government for compulsory acquisition for a public purpose. The notification was published in the official gazette. Public notices of the gazette notification would appear to have been displayed in the locality. But individual notices were not given to the petitioners. The question raised before Koshal, J., was whether for want of individual notices on the petitioners, as persons interested in the lands, the subsequent proceedings would be rendered invalid. The learned Judge was referred to a decision in *Easwara Pillai* v. *State of Tamil Nadu*[1], in which Palaniswami, J., held that individual notices were indispensable under the law and in the absence of such individual notices the persons aggrieved were entitled to move this Court under Article 226 of the Constitution for setting aside all proceedings subsequent to the Government's notification in the Gazette. But a contrary view was found expressed in two earlier unreported decisions rendered by learned single Judges of this Court. According to this earlier view, the omission to send individual notices of acquisition to each and every one of the persons interested in the lands was of no consequence to the validity of the acquisition. With these citations before him and not wishing to hazard yet another single Judge opinion to the existing conflict of authority in this Court, Koshal, J., deemed it proper to refer these writ petitions to be heard and determined by a larger Bench.

6-7. The facts bearing on the question before us are not very much in dispute. The Coimbatore Municipality is running an elementary school in Oppanakara Street in Coimbatore Town. The building in which the school is housed is its own. But the accommodation was found inadequate to its growing needs. The Municipality, accordingly resolved, to acquire portions of land which lay on either side of the existing premises for expansion of the school. The council then moved the State Government to acquire the said lands for the school, undertaking to meet the cost of acquisition from out of municipal funds. The State Government thereupon issued a notification in the Gazette under section 4 (1) of the Land Acquisition Act. The notification was published on 26th March, 1970. It set out the purpose of the acquisition, the particulars of the lands to be acquired and the names of the person interested in the lands. The Special Deputy Tahsildar (Land Acquisition) Town Planning, Coimbatore was named as the authority to discharge the functions of the Collector under the Land Acquisition Act in relation to this acquisition. Following the Gazette Notification, the Special Tahsildar caused public notices to be displayed in the village *chavadi* and the municipal office. The notification of acquisition was also broadcast in the locality by beat of tom-tom. The lands notified belonged to a number of persons as co-owners. In response to the public notices, a few of them came forward to file their objections before the Special Tahsildar, objecting to the acquisition of their lands for the school. The Tahsildar held an inquiry into the objections on 17th June, 1970, 4th July, 1970 and 14th July, 1970. At the conclusion of his inquiry he forwarded the proceedings along with his recommendations to the Government. On 28th April, 1971, the Government published a declaration in the Gazette declaring that the lands notified were required for the extension of the municipal school. The Tahsildar there-

1. (1972) 1 M.L.J. 92: 85 L.W. 894.

upon took orders from the Government for acquisition and proceeded to conduct the inquiry into compensation to be awarded to the persons interested in the lands. At the conclusion of the inquiry, he announced his award of compensation on 8th March, 1972. He followed it up by sending notices of the award to such of those persons who were not present at the time he made the award. Among the absentees who received notices of the award were Padmavathi and Bheema Raju, who are the two writ petitioners before us.

8. In the events that happened, as narrated above, the complaint of the petitioners before us is that proper notice of the acquisition had not been given to them by the Tahsildar. It is not the petitioners' case that no public notices were at all published by the Tahsildar following the Government's notification in the Gazette. Nor do they contend that the manner of their publication fell short of the legal requirements. Their one and only grievance is that the Tahsildar did not give them any individual notices informing them about the Government's preliminary notification for acquisition. Their complaint before us is that thereby they had been deprived of the opportunity of objecting to the acquisition at the right moment and of availing themselves of the inquiry held by the Tahsildar.

9. In the counter-affidavits filed in this Court on behalf of the Special Tahsildar and the State Government there is no denial of the allegation in the writ petition that the petitioners were not served with any individual notices of acquisition immediately following the preliminary notification by the Government in the Gazette. Nor do the records, which we had an opportunity to peruse at the hearing, show that any such notices were addressed by the Tahsildar to the writ petitioners or, for that matter, to any of the other persons interested in the lands in question. It may, therefore, be taken as a fact that apart from public notices, no individual notices were given to the petitioners informing them about the Government's preliminary notification. Even so, the case of the respondents is that on that account the whole course of the subsequent proceedings for acquisition could not be held to be invalid. It was pointed out that the public notices, in response to which some of the persons interested had filed their objections, must be held to be adequate notice under the law to all the persons, concerned, including the petitioners.

10. The question for our consideration, then, is whether it is a necessary requirement of the law that owners of land should receive individual notices from the Land Acquisition Collector of the Government's intention to acquire the land for a public purpose, so as to enable them, if they so chose, to object to the acquisition. The further question is, whether the acquisition proceedings would be invalid if such individual notices were not given to the persons interested in the land. The answer to these questions must be found, first, in the provisions of the Land Acquisition Act, 1894. Section 4 (1) of the Act, which is the pertinent provision in this regard, is in the following terms:

> "Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for a public purpose a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the locality."

11. The section deals with the genesis of the proceedings for compulsory acquisition. The appropriate Government must first be satisfied that any land in a given locality is needed, actually or potentially, for a public purpose. If the Government is so satisfied, then a notification to that effect has to be published in the Gazette. The section does not require that even for the initial formation of its opinion that the land is needed for a public purpose, the Government should send notices to the owners of the land, convene them, and listen to their objections. The satisfaction of the Government both as to the needs of public purpose and as

to the particular land that would satisfy those needs is purely a subjective satisfaction. The Gazette notification is to be issued solely on the basis of this subjective opinion of the Government. What should follow the gazette notification is also laid down in the section. It provides that the Collector should cause public notice of the gist of the Government's notification in convenient places in the locality. The marginal note to the section sums up the procedure correctly when it refers to *"publication* of preliminary notification." Public notice by the Collector is mandatory, as might be seen from the use of the word "shall" in the section. He would be failing in his duty if he did not cause public notice to be displayed in convenient places in the locality. Failure or omission to comply with this step in the procedure for acquisition would invalidate subsequent proceedings, and any person aggrieved would have a right to move the Court under Article 226 of the Constitution to have them quashed, *vide* observations of the Supreme Court in *State of Mysore* v. *V. K. Kangan*[1], wherein this position is clearly laid down, although the person aggrieved in that case was not allowed to challenge the proceedings on this ground, on account of unreasonable delay.

12. In the present case, as we had earlier pointed out, the writ petitioners do not seek to challenge the acquisition proceedings on the score that no public notice was given as required by section 4 (1), or even on the ground that the public notice as actually given by the Collector fell short of what is contemplated by the section. Their grievance is that the Collector did not personally inform them about the Gazette notification by issuing to them individual notices containing the gist of the Government's decision to acquire the lands in question for a public purpose. This argument, manifestly, could not be founded on the words of section 4 (1). This is because the section, while being positive about the Collector's duty to give public notice in that locality stops short with that provision. It does not impose on the Collector any other positive duty in regard to notice of the Government's Gazette notification. Sub-section (2) of section 4 deals with the next step in the procedure for compulsory acquisition, and it begins with these words, "Thereupon, it shall be lawful for any officer, etc." These words are an indication that the issue of Gazette notification and publicising of the Gazette notification by display of public notices in the locality are both intended to exhaust the process of notice-giving at the preliminary stage. There are other indications, too, in section 4 (2) to the same effect. The sub-Section provides that on the publication of the Government's preliminary notification in the Gazette and the Collector's public notices in the locality, the Government may authorise any of its officers to enter upon and survey the lands in the locality and to do any acts necessary to ascertain whether the land notified for acquisition for the avowed public purpose is suitable for that purpose. The Government might, under this sub-section authorise its officers to enter any building or dwelling-house or any enclosed Court or garden attached thereto. But the proviso to section 4 (2) clearly enacts that this power of entry of residential buildings etc., cannot be exercised by the officers without previously giving the occupier of the premises at least seven days' notice in writing of his intention to do so. The reference to notice in this proviso is specific and detailed. It requires that the notice should be in writing, it should be addressed to the occupier, it should be served on him personally, and it should give him seven days' time. The proviso, no doubt, dispenses with notice as unnecessary wherever the occupier himself consents to the inspection of the premises. But, short of obtaining the occupier's consent, the power of entry can be exercised by the officers authorized in that behalf only after service of individual notices on the occupier. How the notice on the occupier is to be served is dealt with by section 45 (1), which provides that 'in the case of a notice under section 4' it shall be effected by "the officer therein mentioned" by delivering or tendering a copy thereof signed by him to the per-

1. (1976) 2 S.C.C. 895: (1976) 1 S.C.R. 369: A.I.R. 1975 S.C. 2190 at 2193.

son intended to be served with the notice. Section 45 (1) in terms, only refers to "section 4", but it is obvious that this reference cannot appertain to any notice under sub-section (1) of that section; it can only refer to the notice of intention to enter the premises issued to the owner or occupier of a residential house by officers generally or specially authorized in that behalf by the Government, in connection with the proceedings contemplated by section 4 (2) and the proviso thereto.

13. On the terms of section 4 (1), therefore, there can be no scope for assuming that the Collector's statutory obligation to publicise the Government's preliminary Gazette notification for acquisition extends to the giving of individual notices to the persons interested in the lands notified for acquisition.

14. Mr. Ramalingam, learned counsel for the writ petitioners, however referred to section 5-A of the Act as an aid to the understanding of the true scope and intendment of the statute regarding notice of the acquisition even at the preliminary stage. In this case, the procedure under section 5-A had not been dispensed with by any direction made by the Government in exercise of its powers under section 17 (4). Section 5-A would, accordingly have full force and effect. Learned counsel urged that under section 5-A (1) any person interested in the land notified for compulsory acquisition was at liberty to object to the acquisition, and, when once he lodges his objections, the Collector would be under duty bound to give him an opportunity of being heard. Learned counsel proceeded to urge that the opportunity of being heard which section 5-A conferred could only have meaning and reality if all the persons interested in the land were first made aware of the desire of the Government to acquire the lands. According to learned counsel, it was implicit in section 5-A that every one who had a stake in the land should be individually served with the notice of the acquisition. Learned counsel referred, in this connection, to an unreported judgment of Ramaprasada Rao, J., in *S. Palani Gounder* v. *The Land Acquisition Officer, Omalur, Salem District*[1]. The facts of the case are not necessary to be noticed. The conclusion of the learned Judge was that individual notices to persons aggrieved must be given in every case. This position was derived by the learned Judge on his construction of section 5-A. He observed:

> "The very intention of section 5-A of the Act is to give all persons interested in the land, which is subject to the compulsory process, to state their objections and after such objections are received, the Land Acquisition Officer is mandatorily obliged to give such an objector an opportunity of being heard either in person or by pleader. After giving such a full hearing, as contemplated under section 5-A (2), the Land Acquisition Officer shall make his recommendations and submit the case for decision to the appropriate authority."

15. It seems to us that the learned Judge has read more into the section than its language can bear. Section 5-A has three sub-sections. Under sub-section (1) any person interested in any land which has been notified under section 4 (1) is at liberty to object to the acquisition of the land within 30 days after the issue of Gazette notification. Sub-section (2) requires that objection shall be made to the Collector in writing. It further provides that after the receipt of written objection from any person interested the Collector shall give to him an opportunity of being heard either in person or by pleader. It is also provided in the same sub-section that the Collector shall himself hear the objections. Apart from hearing the objections, the Collector is also empowered to institute further inquiries. On the conclusion of the inquiry, the Collector is to make a report to the Government containing a record of the proceedings and also his recommendations on the objections. Any decision that the Government might take on the objections is declared by this sub-section to be final. Sub-section (3) of section 5-A merely lays down the *locus standi* of the objectors by inserting a special defi-

1. W.P. No. 1686 of 1971, dated 31st January, 1973.

nition of the expression "person interested." But this definition is more or less a repetition of the definition in the interpretation clause contained in section 3 (*b*) of the Act. According to these provisions, a person shall be deemed to be interested in the land who would be entitled to claim an interest in compensation if the land were acquired under the Act.

16. The foregoing analysis of section 5-A of the Act would show that the section deals not with the stage of notice of acquisition, but with a subsequent stage. We have earlier described section 4 (1) as marking the very beginning of the acquisition proceedings under the Land Acquisition Act. Section 5-A, no doubt, confers on the persons interested a right to object to the acquisition, but under sub-section (1) this right has to be exercised by them within 30 days after the preliminary notification under section 4 (1). The prescription of a time-limit in section 5-A (1) and its computation as of a fixed period *after* the notification under section 4 (1) clearly show that the provision deals with a stage subsequent to the stage of notification of the acquisition. The right to object, under section 5-A, begins to operate from the date of the notification. The person objecting may file his objection on the very next day after the Gazette publication or on any day falling within a period of 30 days. By that time, the Collector may or may not have given public notices in prominent places in the locality in accordance with section 4 (1). Irrespective of the date of his public notice the Collector has to entertain the objections, provided they are filed wihin 30 days after the Gazette publication. This, again, shows that the right conferred by section 5-A (1) has nothing whatever to do with the mechanics of notice which the statute contemplates for publicising the notification of the Government under section 4 (1). We are satisfied that the right under section 5-A (1), in content as well as in chronology, is a bare right to object to the acquisition. The section does not deal with any right, properly so-called, to notice of the acquisition itself.

17. Of what use, it was asked in argument, is a right to object, if the person concerned does not know, and has no means of knowing, that his land has been notified for acquisition? This, however, is mere rhetoric, of a kind that a law reformer may properly employ to some purpose on the floor of the Legislature or in his published writings. But for lawyers and Courts whose task it is to interpret the legislative enactment, the answer must only be found in the words of the section or not at all. Ramaprasada Rao, J., had taken the view that it is implicit in section 5-A that notices ought to go to all the individuals interested in the land. In our view, however, the language of section 5-A, when read in juxtaposition to section 4 (1), does not bear any such implication being read into it.

18. Mr. Ramalingam made a reference to the statement of Objects and Reasons set out in the Bill which introduced section 5-A in the Act in the year 1923. According to this statement:

> "The object of the Bill is to provide that a local Government shall not declare under section 6 of the Act that any land is needed for a public purpose unless time has been allowed after the notification under section 4 for persons interested in the land to put in objection and for such objections to be considered by the local Government."

19. We do not find even in this statement of Objects and Reasons any indication of an intention to enlarge the scope of the notice. It may be observed that while section 5-A was newly introduced by the Land Acquisition Amendment Act (XXXVIII of 1923), the provisions of section 4 (1) relating to notice were not subjected to any amendment whatever. Indeed, right from 1894, upto the present day section 4 (1) has remained the same, in this regard. The Law Commission in its 10th Report, dated 26th September, 1958, had suggested an amendment of section 4 (1) in the direction of liberalising the procedure for notice. Under the Law Commission's proposals.

"the Collector shall cause—

(a) public notice of the substance of such notification to be given at convenient places in the locality in which the land is situated, and

(b) a copy of such notification to be served on the owner, and where the owner is not the occupier, also on the occupier, of the land."

20. These amendments, especially clause (b), are yet to be written into the statute book. Till that time comes, we must construe and persist in construing section 4 (1) only on its present terms. We would not be justified in writing into the section what properly is the function of future legislation. The canons of statutory construction do not include anticipatory interpretation.

21. Reference was then made to rule 1 of the Madras Land Acquisition Rules framed by the State Government in exercise of its rule-making power under section 55 (1) of the Act. The said Rule is in the following terms:

Rule 1: "Immediately after the publication of the notification under section 4 (1), the Collector shall issue a notice stating that the land is needed, or is likely to be needed, as the case may be, for a public purpose and requiring all persons interested in the land to lodge before the Collector within 30 days after the issue of the notification, a statement in writing of their objections if any, to the proposed acquisition. This notice should be published at convenient places in the said locality, and copies thereof fixed up in the office of the Collector, the Tahsildar, and in the nearest Police Station."

22. This Rule does not so much as whisper anything about individual notices to the persons interested in the land. All it does is to repeat the provisions of section 4 (1) and, by way of elucidation, make mention of the places where copies of the public notice should be exhibited.

23. It would appear that different States have different Rules on the subject of notice. In *Ajit Singh* v. *State*[1], a Division Bench of the Bombay High Court had occasion to construe the relevant rule in force in the State of Maharashtra. In the course of their judgment, the learned Judges observed that "Neither section 4 nor section 5-A, contains any provision for the service of individual notice on any person interested in the land sought to be acquired by a notification under section 4." They were, however, referred to rule 1 framed by the Government of Maharashtra. It was to the following effect:

"Whenever any notification under section 4 has been published but the provisions of the section have not been applied and the Collector has under section 4 (1) issued notice to the parties interested, and on or before the last day fixed by the Collector in those notices in this behalf any objection is lodged under section 5-A (2): Firstly the Collector shall record the objection in his proceedings, secondly, the Collector shall consider whether the objection is admissible according to these rules."

24. Before the learned Judges, there was no dispute that this rule formed part of the statutory rules made by the State Government in exercise of its powers under section 55 (1) of the Act and hence it had the force of law. Proceeding to construe the rule, the learned Judges held that the words "the Collector has, under section 4 (1), issued notices to the parties interested" clearly indicated that individual notice should be given to all the parties interested in the land. Since such notices were not given to the writ petitioners before them, the learned Judges quashed the proceedings.

25. Whether or not the conclusion of the learned Judges is justified on the construction of the words of rule 1 of the Maharashtra Rules is not for us to say. So far as the relevant Rule in force in this State is concerned we have no doubt whatever that it does not envisage or contemplate, much less expressly provide, that individual notices shall be addressed to all the persons interested in the land, in addition to the publication of

1. (1972) Mah. L. J. 103 : 74 Bom. L. R. 345 : I.L.R. (1972) Bom. 1147 : A.I.R. 1972 Bom. 177.

notices in prominent places in the locality.

26. Learned counsel referred us, in this connection, to a decision of the Supreme Court in *State of Mysore* v. *V. K. Kangan*[1]. The Supreme Court in that case was concerned with the question of validity of rule 3 (*b*) of the Madras Land Acquisition Rules. This Rule provided that the Collector, while conducting an inquiry under section 5-A (2) of the Act, must also issue notice of the hearing to the Department at whose instance the land was proposed to be acquired. In the case before the Supreme Court the Collector did not give notice to the Education Department, which was the concerned Department interested in that acquisition. It was argued that rule 3 (*b*) was not mandatory, and, if it was, it would be against the provisions of section 5-A (2) which invested the Collector with a complete discretion in the matter of conducting the inquiry, his only statutory obligation being that he should serve the notice of the inquiry on the persons who had lodged their objections. This argument was repelled by the Supreme Court. The learned Judges held that the concerned rule 3 (*b*) was not only *intra vires* the Act, but also mandatory in character.

27. We do not see how this decision can be relied on as authority for the position that the persons interested in the land must be given individual notices of the intended acquisition. The provisions of rule 3 (*b*) and section 5-A, with which the Supreme Court was concerned, deal with a stage in the compulsory acquisition proceedings which, as we have shown earlier, is subsequent to the issue of the gazette notification by the Government under section 4 (1). While section 4 (1) and rule 1 are obviously intended to facilitate objections to be lodged by the persons interested in the subject-matter of the acquisition, neither section 4 (1) nor rule 1 contemplates that the Collector should serve individual notices on the persons interested in the lands. Under the scheme of section 5-A the question of sending individual notices to persons hardly arises until the proceedings reach a stage when objections are actually lodged with the Collector and an inquiry into these objections has to be gone into by him. Besides, even at the stage when the Collector has taken the objections on file, his obligation under section 5-A (2) to send notices of inquiry does not extend to all persons interested in the land, but is limited only to those of them who had lodged their objections before the Collector within 30 days of the gazette notification. It follows, therefore, that for the purposes of seeing whether or not the initial notices of acquisition should be served individually on all the persons interested in the land, we would not have to be searching the provisions of section 5-A or of the relevant rules bearing on section 5-A, but have to look only to section 4 (1) and rule 1 for the purpose. The decision of the Supreme Court cited above is not addresed to any question touching the notice of acquisition, but is concerned rather with the subsequent notice of the inquiry which is taken up by the Collector after he receives the objections on file.

28. Mr. Ramalingam then pressed before us the contention that, notwithstanding the absence of any specific provision in the Act or in the Rules in force in this State for sending individual notices of acquisition to persons interested in the land at the stage of proceedings under section 4 (1) of the Act, such notices must be given even at that particular stage, since they are required to be given under executive instructions issued to the officers concerned by the State Government. He relied on a circular issued by the State Government in G.O. No. 196 Revenue, dated 6th February, 1926 set out at pages 84 and 85 of the Land Acquisition Manual (1961). Paragraph 1 of the circular states as under:

> "The statutory rules framed under the Act, require that immediately after the publication of the notification under section 4 (1) the Collector shall issue a notice calling on all persons interest-

1. (1976) 1 S.C.R. 369 : A.I.R. 1957. S.C. 2190.

ed in the land to prefer in writing their objections, if any, to the acquisition. The notice should be published at convenient places in the locality and copies thereof should be affixed to the notice boards in the offices of the Collector and Tahsildar and in the nearest Police Station".

29. The above passage is more or less a repetition of rule 1 of the Land Acquisition Rules. But the G.O. lays down the following further instructions:

> "The notice should also be served individually on every person known or believed to be interested in the land to be acquired in the manner prescribed by sub-sections (3) and (4) of section 9".

30. It is this last passage on which Mr. Ramalingam places strong reliance. According to him, these instructions issued by the Government are binding on the Collector, and since they were not complied with in the present case, the acquisition proceedings must be held to be invalid.

31. Learned counsel supported the aforesaid contention on the basis of the decision of Palaniswami, J., in *Easwara Pillai* v. *State of Tamil Nadu*[1], to which we have made reference at the beginning of this judgment. In that case the Collector had already entered upon his inquiry under section 5-A (2). The question before the learned Judge was whether the Collector was under a duty to issue a notice to a person interested in the land who had not lodged his objections under section 5-A (1), but whose interest in the land had subsequently come to the knowledge of the Collector in the course of the inquiry under section 5-A (2). It appears that in the notification under secion 4 (1) the name of Ayyappan Pillai figured as the owner of a particular item of land which was included in the subject-matter of acquisition. Actually, however, this item of land had long ago been partitioned and been allotted to the share of Ayyappan's sons, prior to the notification under section 4 (1). Accordingly, when notice of inquiry under section 5-A (2) was served on him, Ayyappan appeared before the Collector and placed the correct facts relating to present ownership of the land. The Collector omitted to act on that information and did not direct notices to be served on Ayyappan's sons. He proceeded, instead to continue the inquiry under section 5-A (2) in their absence. Subsequently, a draft declaration was made under section 6 (1), and further proceedings were taken for inquiry into the compensation. At this stage, the sons of Ayyappan approached this Court and sought for a *certiorari* to quash all the proceedings taken by the Collector subsequent to the notification under section 4 (1). Their contention was that the Collector was bound to serve individual notices on them of the inquiry under section 5-A (2), giving them an opportunity to object to the acquisition, considering that he knew that they were the real owners of the land which had been notified by the Government for acquisition. Before Palaniswami, J., reliance for the petitioners was mainly placed on Board's Standing Order No. 90, which, in turn was based on G.O. No. 196, Revenue, dated 6th February, 1926, issued by the State Government portions of which we have set out earlier in this judgment. The Board's Standing Order is to be found at page 41 of the Land Acquisition Manual and it contains *inter alia,* the following instructions:

> "Besides publishing the notice as prescribed in rule 1 of the Appendix, the Collector should see that the individual notices are served as far as possible on every person known or believed to be interested in the land to be acquired in the manner prescribed by sub-sections (3) and (4) of section 9 of the Land Acquisition Act, I of 1894".

32. A foot-note to the Standing Order shows that the source of the Board's instructions was to be found in G.O. No. 196, Revenue, dated 6th February, 1926.

33. In the course of his examination of the relevant provisions, Palaniswami,

1. (1972) 1 M.L.J. 92: 85 L.W. 894.

J., observed that neither the G.O. nor the Board's Standing Order could be regarded as a statutory rule made under section 55 of the Land Acquisition Act. The learned Judge noticed that for exercise by the Government of its rule-making power under section 55 there were certain requirements to be fulfilled and formalities to be observed in order that the Rules may acquire "the force of law". Those are: (*i*) previous publication of Rules in draft form, and (*ii*) final publication of the Rules in the Gazette. The learned Judge recognised the legal position that a Board's Standing Order or an executive direction by the Government cannot be equated to a statutory rule made by the Government under section 55. Nevertheless, the learned Judge took the view that the instructions contained in the G.O. and the Board's Standing Order had "statutory force". According to the learned Judge, the instructions issued by the Government and the Board of Revenue and incorporated, in the Land Acquisition Manual could not be dismissed as those emanating from a superior official to a subordinate official. The learned Judge further observed that the instructions which related to the issue of individual notices to the persons interested in the land obviously satisfied the principles of natural justice. On these reasonings, the learned Judge held that any violation of the instructions contained in the Board's Standing Orders would give rise to a cause of action to a person aggrieved and this Court would have jurisdiction to interfere under Article 226 of the Constitution. In this view of the matter, on the admitted fact that the petitioners were not given individual notices of the acquisition, the learned Judge quashed all the proceedings in that case subsequent to the notification under section 4 (1) of the Act.

34. With respect, we do not subscribe to the view of Palaniswami, J. The Board's Standing Order No. 90, on which the learned Judge relied, forms part of the Land Acquisition Manual prepared by the Government of Tamil Nadu. The introduction to the Manual states that the scope of the Manual is to present in a form readily available for reference by the Officers responsible for land acquisition proceedings, information relating to general principles and details of the procedure to be followed at each stage of the proceedings. Board's Standing Order Nos. 90 and 91 are set out in Part II of the Manual. Board's Standing Order No. 90, with which we are concerned, relates to acquisition of land for public purposes. It is divided into many sections. Section 2 is entitled 'Preliminary Proceedings'. Paragraph 9 in section 2 contains the relevant instructions that "besides publishing the notice as prescribed in rule 1, the Collector should see that individual notices are served as far as possible on every person known or believed to be interested in the land to be acquired".

35. Neither the Board's Standing Order nor any other part of the Land Acquisition Manual indicates under what authority these instructions had been issued to the Collectors and other officers functioning under the Land Acquisition Act. The Board of Revenue at Madras is a statutory authority whose powers and functions were defined for the first time in statutory form in the Madras Board of Revenue Regulation (I of 1803) passed by the Governor-General-in-Council on 1st January, 1803. It appears from the preamble to the Regulation that prior to the establishment of Courts of judicature in the Presidency for administering justice in all cases, civil and criminal, it was usual for the Board of Revenue to exercise judicial authority in the determination of certain cases of a civil nature by way of appeals from the Collectors who were entrusted with the administration of revenue and dispensation of justice in their respective districts. After the establishment of Courts of judicature it was decided that the judicial authority theretofore being exercised by the Board of Revenue should be formally abrogated and the powers and authorities of the Board of Revenue should be re-defined in respect of its executive administration of the revenue. Accordingly, sections 4 and 5 of the Regulation enacted the duties of the Board of Revenue and its powers of

superintendence and control of persons employed in the executive administration of revenues. Section 4 enacts that the duties of the Board of Revenue have been, and are declared to be, (*i*) the general superintendence of the revenues from whatever source they may arise, and (*ii*) the recommendation of such propositions to the State Government and in their judgment may be calculated to augment or improve those revenues. Section 5 enacts that the Board of Revenue had, and are declared to have, authority to superintend and control all persons employed in the executive administration of the public revenue, all zamindars or proprietors of land paying revenue, and all farmers, securities, raiyats or other persons concerned in, or responsible for, any part of the revenue of Government, as far as the said superintendence and control may relate to the executive administration of the revenue under the regulations now enacted, or to be hereafter enacted. Section 33 of the Regulation enacts that the Board of Revenue shall be responsible that the executive officers employed under them discharge the duties of their respective stations with assiduity and for that purpose the Board shall require the officers to pay ready and implicit obedience to all its orders and regulations. To the same end, the Board was empowered to punish, at its discretion any neglect on the part of such officers.

36. The above provisions make it clear that the Board of Revenue is only concerned with the superintendence of the revenues of the State from whatever source derived. Its powers of superintendence and control are limited to the persons employed in the executive administration of public revenue, and even those powers only relate to the control of the executive administration of revenue under the appropriate regulations. Even its disciplinary jurisdiction is confined strictly to the subordinate officers of the revenue. The subject of compulsory acquisition of land for public purposes is by no means connected with the administration of the revenue of the State. Payment of compensation out of the coffers of the State may have to do with the expenditure of the revenues, but what Regulation I of 1803, has entrusted to the Board is the raising of the revenues from whatever source derived. The Board's position at the summit of the revenue administration cannot give it, on that account and without more, a similar position in the hierarchy of officials entrusted by the law with the implementation of the land acquisition proceedings. If the Board claims any powers of superintendence, control and administration over the Land Acquisition Collectors and their subordinates that must be spelled out from the provisions of the Land Acquisition Act itself or from any other express piece of legislation on the subject. We have not come across any piece of legislation in which the Board of Revenue has been given any powers as respects proceedings or officers under the Land Acquisition Act. As for the Land Acquisition Act itself, it is quite remarkable that in all its various provisions there is not a single place in which the Board gets so much as a passing mention. The authorities exercising powers and functions under the Land Acquisition Act are three in number, but the Board of Revenue is not one of them. The three authorities, in fact, are the Government, the Collector and the Courts of Law. Besides, the Act establishes a direct link between the Collector and the Government for certain purposes and between the Collector and the Courts for certain other purposes. Subject to the authority of the Government in regard to certain matters, on the one hand, and subject to the Courts' jurisdiction in certain other matters, on the other, the Collector is all-in-all under the Act and the Board is nowhere in the picture. The Collector, for purposes of the Land Acquisition Act may be either the District Collector or any other officer specially appointed to perform the functions of a Land Acquisition Collector. Whatever departmental disciplines and loyalties to which the District Collector and other revenue officials might be subject as subordinates of the Board of Revenue in so far as revenue administration is concerned, their status is that of distinctive statutory authorities once they begin functioning as Collectors under the Land

Acquisition Act. The first piece of legislation for compulsory acquisition of land was the Bengal Regulation (I of 1824) which was applied with some modification to the Presidency of Madras for the first time by Act XX of 1852. The first all-India enactment was Act VI of 1857 which was replaced by Act X of 1870 which ultimately yielded place to the present Land Acquisition Act of 1894. At no point in the evolution of the statute law relating to land acquisition in this country has the State Board of Revenue figured as an authority entrusted by the statute with any powers or duties or functions connected with compulsory acquisition of land for public purposes. The Legislature has apparently deliberately provided for the appointment of the District Collector who is the head of the Revenue Administration in the District as the Land Acquisition Officer while at the same time desisting from handing over the entire set up of the administrative machinery entrusted with implementation of the provisions of the Land Acquisition Act, to the higher echelons of the revenue hierarchy.

37. That the Board of Revenue has no powers of superintendence or control apart from what the Board of Revenue Regulation or other statute confers on it, is illustrated by a decision of a learned single Judge of this Court reported in *Duraiswami Mudaliar* v. *Secretary of State for India in Council*[1]. In that case, a person was appointed as village headman by the Revenue Divisional Officer. His order was confirmed in appeal by the District Collector. Another individual whose claim was rejected by both the officers purported to file what he was pleased to describe as a 'second appeal' to the Board of Revenue. The Board of Revenue allowed the appeal and set aside the orders of the Revenue Divisional Officer and the District Collector. The person aggrieved against the Board's decision filed a civil suit to set aside the Board's orders. One of the questions raised in the suit was whether the Board of Revenue had jurisdiction to interfere with the orders passed by the Revenue Divisional Officer and the District Collector under the Madras Hereditary Village Offices Act, 1895. In second appeal, Wadsworth, J., held that the order of the Board of Revenue was illegal. Under the scheme of the Madras Hereditary Village Offices Act, 1895, whenever there was a vacancy to an hereditary office, the Collector shall fill up that vacancy and that any dissatisfied claimant shall have the remedy of a suit before the Collector to establish that he had a better right. Under the Subordinate Collector's Regulation, 1828, the powers of the Collector are to be wielded in the first instance by the Revenue Divisional Officer, subject to revision by the Collector. In this statutory scheme, the learned Judge considered the *locus standi* of the Board of Revenue to interfere in so-called second appeal or review with the appointment of the Village Officer. The learned Judge observed as follows:

> "The only power which can be claimed by the Board of Revenue is based on section 5 of the Board of Revenue Regulation (I of 1803), whereby the Board of Revenue is given authority to superintend and control all persons employed in the executive administration of the public revenue...... But I am emphatically of opinion that these general powers of superintendence did not authorise the Board of Revenue to arrogate to itself a power of interference in revision or in second appeal from a statutory order, when machinery of the statute itself confers no such power........"

The learned Judge further observed thus:

> "In my opinion, the order of the Board of Revenue purporting to act in second appeal or revision and to decide a matter which according to the machinery of the Act should have been decided by a suit under section 13 of Act III of 1895, was an illegal attempt to invade the vested rights of the plaintiff."

The above decision has been approved by a Full Bench of this Court in *Nagarathnammal* v. *Ibrahim*[1].

1. (1939) 2 M.L.J. 6: 49 L.W. 773: A.I.R. 1939 Mad. 648.

1. (1955) 2 M.L.J. 49: 68 L.W. 206: I.L.R. (1955) Mad. 460: A.I.R. 1955 Mad. 305 (F.B.).

38. The same is the position in the present case under the Land Acquisition Act which is not only a special enactment but a complete code in itself. We therefore, hold that the Board's Standing Order No. 90 relied on by learned counsel for the petitioners has no statutory sanction.

39. Palaniswami, J., in *Easwara Pillai* v. *State of Tamil Nadu*[1], clearly observed that the instructions contained in Board's Standing Order No. 90 were not issued under section 55 and strictly speaking they are not statutory rules. The learned Judge, however, proceeded to observe, "But, nontheless, the instructions have statutory force". It is difficult to understand how the instructions of the Board, which are neither statutory nor rules, could yet possess "statutory force". In our opinion, the only force that executive instructions can have, or hope to have, is executive force; they cannot have legislative or statutory force. Under section 55 (3) of the Act, rules framed by the appropriate Government after following the requirements of that section, can alone possess the "force of law" and not any other instruments. We have earlier shown how the Board of Revenue has no place in the scheme of the Land Acquisition Act. Considered from that view-point, Board's Standing Order No. 90 cannot even claim the status of executive instructions.

40. Before us learned counsel for the petitioners did not rely so much on the Board's Standing Order No. 90. He relied rather, on the order passed by the State Government in G.O. No. 196, Revenue, dated 6th February, 1926, relevant portions of which we have extracted and set out in an earlier part of this judgment. But the question would still remain the same. Can the instrustions issued by the Government have statutory force? The answer, to our minds must be in the negative. The G.O. relied on is found published in the Land Acquisition Manual in Part III entitled "General Principles and Procedure". The particular G.O. is included in Chapter V of Part III. Chapter I of Part III contains an order by the Government, G.O.Ms. No. 2475, Revenue, dated 4th March, 1946, which explains the scope and effectiveness of the instructions contained in that Part. This Gazette Order is published at page 77 of the Manual and is as under:

> "Rules have been framed under section 55 (1) of the Land Acquisition Act prescribing the procedure to be adopted to give full effect to the spirit of the amending Act, and these have the force of law. They have been further supplemented by executive instructions which though not having the force of law, yet bind the officers of the Government in their land acquisition work."

The above G.O. makes two things clear. (*i*) The instructions contained in Part III including G.O. No. 196, Revenue, dated 6th February, 1926 are not rules framed by the State Government in exercise of its powers under section 55. (*ii*) The instructions have no legal force.

41. Apparently this order, G.O. No. 2475, dated 4th March, 1946, was not brought to the notice of Palaniswami, J. Quite apart from the recognition by the Government in this G.O., that the executive instructions issued by it have no statutory force, the true position in law of such instructions could never have been in doubt. It was urged that the instructions by the Government are for the guidance of the officials. But under the peculiar terms of section 55 (1), which Palaniswamy, J., carefully noted, even instructions issued by the Government 'for the guidance of officers' can have validity only if they are promulgated in the form of statutory rules, following the procedure and formalities laid down in section 55. Even otherwise, assuming that the Government is not barred from issuing "extra-statutory" instructions for the guidance of its officers, those instructions can only be interpretative of the existing statutory provisions. In this context, the departmental interpretation must necessarily give way to judicial interpre-

1. (1972) 1 M.L.J. 92: 85 L.W. 894.

tation. What the Courts say of a statute is the law; by which is meant, not only that it is binding on all authorities entrusted with the task of administering the statute, but also that the Court's interpretation can be got over only by legislative amendment. In contrast, departmental or governmental interpretation of Acts of the Legislature have no such binding authority. Even the officers of the Government cannot excuse themselves from Court's interpretation by the protest that they are bound, under the departmental discipline, to obey their superior's instructions. It may be observed that whenever a question is raised before the Court on a matter of statutory interpretation, not only is the Court not bound by any executive instructions on the subject, but the Court will not even be swayed by the consideration that any action of an executive authority has been done under the colour of the authority of those instructions. We do not, therefore, concur with the views of Palaniswami, J., based, as they are, on the Board's Standing Orders or on the Government's instructions. In our considered opinion, Government literature on land acquisition procedure cannot be relied upon by the petitioners to support their contention that the acquisition proceedings in this case are invalid because they were not served with individual notices of acquisition immediately following the Gazette notification under section 4 (1).

42. Mr. Ramalingam, learned counsel for the petitioners cited a decision of the Supreme Court in *Union of India* v. *Joseph*[1], to support the proposition that even executive instructions issued by the Government could confer rights on the subject and when those instructions are not complied with by subordinate officials the subject would have a right to move this Court for redress. The question in that case was, whether a general order passed by the Ministry of Defence on 15th July, 1960 applied to a clerk who belonged to ex-military personnel and who was employed on the civil side. It was contended by the Central Government that the order was 'purely an administrative direction and it did not confer any justifiable right on the official in question such as could be enforced by the issue of a *mandamus* by the Court. This contention however was not accepted. The Supreme Court held that the order passed by the Defence Ministry must be regarded as supplementing the rules framed under Article 309 of the Constitution of India and since they were not inconsistent with those rules, the instructions must be regarded as governing the conditions of service of the concerned Government servant. It was in that context that the Supreme Court observed thus:

> "To say that an administrative order can never confer any right would be too wide a proposition. There are administrative orders which confer rights and impose duties."

We do not think that the above decision of the Supreme Court on the construction of Service Rules and instructions can have application to a case like the present where the questions are: (*i*) whether the Board of Revenue can have *locus standi* to issue guidelines to officers functioning as independent statutory authorities, and (*ii*) whether the Government could issue rules for guidance otherwise than under section 55. Besides, their Lordships have themselves expressly stated in the above decision that "We should not be understood as laying down any general proposition on this question."

43. The next major contention of the learned counsel for the petitioners is that even if the Board's Standing Order No. 90 or the Government's instructions in the Manual were to be held non-statutory yet the omission of the Special Tahsildar to give individual notices to the writ petitioners and the other persons interested was in violation of the rules of natural justice and on this account, the subsequent proceedings taken by him must be held to be void.

44. A similar argument addressed before Palaniswami, J., in *Easwara Pillai*

1. (1973) 2 S.C.R. 752: (1974) 2 S.C.J. 276: A.I.R. 1973 S.C. 303.

v. *State of Tamil Nadu*[1], found favour with the learned Judge and he observed as follows:

> "......rules of natural justice would have to be complied with in the absence of a statutory provision. Violation of these instructions would result in denial of natural justice and would give rise to a cause of action to a person aggrieved by such denial."

The learned Judge relied on a decision of the Supreme Court in *A. K. Kraipak* v. *Union of India*[2], and observed that the principle laid down by the Supreme Court in that decision would squarely apply to the case before him. The question which the Supreme Court had to decide did not arise under the Land Acquisition Act but under certain Service Regulations relating to recruitment. The question was wheher the recommendations of a Special Selection Board for recruitment to the posts in Junior and Senior Scales in the Indian Forest Service was vitiated by the circumstance that the name of one of the members of the Selection Board itself figured in the list of persons to be considered for selection. The recommendations of the Selection Board were impugned on the ground of bias and as being opposed to the rules of natural justice, one of which lays down that "no man can be a judge in his own cause." It was urged before the Court, on behalf of the Union, that principles of natural justice would not apply to purely administrative decisions. The Court however repelled this argument holding that the observance of rules of natural justice extended to administrative decision-making as well.

45. We regard the above decision as authority for the position that the rules of natural justice are not confined in their application to judicial and quasi-judicial proceedings, but apply equally to administrative proceedings. But we do not understand the decision to lay down that even in cases where the statute elaborately deals with, not only the powers and functions of an administrative agency but also the particular procedures that that agency should follow in proceedings wihin its cognizance the principles of natural justice should be freely applied to test the procedural validity of the action taken by the administrative agency. That this was not the broad result intended is shown by the following observations of the Court:

> "What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principles of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

The question of the applicability of the rules of natural justices cannot, in our opinion, be judged *de hors* the provisions of the statute, and this position is made clear by the Supreme Court in the above passage. Earlier in this judgment we have subjected the relevant provisions of the Land Acquisition Act relating to notice of acquisition to detailed scrutiny. We have explained how under the very scheme of its various provisions the Land Acquisition Act does not contemplate the issue of individual notices of acquisition to all the persons interested in the land at the preliminary stage of Gazette notification. Our analysis of section 4 (1), supplemented by reference to the proviso to section 4 (2) read with section 45 (1) and to section 5-A by way of contrast, shows that the omission in the Act to provide for individual notices could not have been accidental. There are other provisions too, such for instance, as sections 9 (4) and 12 (2), which point to the same conclusion. These latter sections in the Act specifically provide for service of individual notices on the persons aggrieved, in the context of the subsequent proceedings for determination of compensation. The pattern which thus emerges is that of an

1. (1972) 1 M.L.J. 92: 85 L.W. 894.
2. (1970) 1 S.C.J. 391: (1970) 1 S.C.R. 457: A.I.R. 1970 S.C. 150.

Act which is deliberately choosy, to employ a colloquialism, in the matter of giving notices. Wherever it was felt necessary and just to give individual notices, the Legislature had made clear and specific provision therefor; wherever it was felt that public notice would more than meet the needs, having regard to the stage of the acquisition, the need for expedition and the requirements of public purpose itself, the Legislature has stopped short with providing for public notice. That the stage of the Gazette notification under section 4 (1) is only the preliminary stage of land acquisition is not only clear from the arrangement and contents of the sections in the Act, but also by decided cases on the subject. It is also clear that the right to object to the acquisition conferred by section 5-A on the persons interested in the land can be taken away in any case of urgency by the Government making a direction under section 17 (4) to the effect that the provisions of section 5-A shall not apply to the land in question.

46. The Land Acquisition Act is a complete Code in itself. Hence, whereever in the context of particular proceedings under the Act the Legislature has not provided for individual notices, that must be regarded not as an accidental or inadvertent omission on the part of the Legislature to provide for full procedure, which omission may be supplied by grafting the principles of natural justice to the relevant provisions, but as a deliberate decision of the Legislature not to import the principles of natural justice, to the fullest extent, into those provisions.

47. Learned counsel for the writ petitioners cited the decision of the Supreme Court in *State of Gujarat* v. *Ambalal*[1], which decided the scope of an inquiry under rule 4 of the Land Acquisition (Companies) Rules (1963). Under the said Rule, the Collector was to inquire into any application made by a company to the Government for acquisition of any land for its purpose. The Rule explicitly made provision for hearing by the Collector of the company in question and also of representations from other Departments of Government. The rule, however, contained no provision for any opportunity to be given, at that stage to the owners of the land sought to be acquired for the purpose of the company. Even though the rule in question was silent regarding the mode of inquiry to be held by the Collector, the Supreme Court yet held that in the interest of fair play, the Collector has to observe the principles of natural justice by affording the persons interested in the lands reasonable opportunity of being heard and of adducing material before the Collector to refute the allegations of the company.

1. (1976) 3 S.C.C. 495 : A.I.R. 1976 S.C. 2002.

48. Our understanding of the above decision is that while the Rule contemplated an inquiry to be made by the Collector, since the procedure for holding the inquiry was not fully laid down, the principles of natural justice could very well be inducted into the Rule for determining what the lawful requirements of the inquiry should be. We do not think that the above decision of the Supreme Court has any application to section 4 (1). We have earlier shown how, on its own terms, as well as in comparison with other provisions in the Act, the public notice contemplated under section 4 (1) must be regarded as exhaustive of the mode of notice. The question of importing rules of natural justice would only arise where the statutory provision can be held to have left gaps that are capable of being filled by the rules of natural justice, without doing violence to the legislative intentions deducible from the terms of the relevant statutory provision.

49. We may refer in this connection, to a recent decision of the Privy Council in *Furnell* v. *Whangrei High Schools Board*[1], as to the proper approach that a Court of law must take whenever natural justice is invoked for the purpose of supplementing express statutory provisions. The Privy Council held in that case that it is not the function of Courts to re-draft the code for the purpose of applying the principles of natural justice.

1. (1973) 2 W.L.R. 92

Lord Morris, delivering the judgment of the Board, quoted from a decision of the Canadian Supreme Court in *Brettinghaum-Moore* v. *Municipality of St. Leonards*[1], the following passage, as relevant:

"The Legislature has addressed itself to the very question and it is not for the Court to amend the statute, by engrafting upon it some provision which the Court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material."

50. Reference was also made to the judgment of Lord Reid in *Wisemann* v. *Borneman*[2], and in particular to the following passage in that judgment at page 308:

"Natural Justice requires that the procedure before any Tribunal which is acting judicially shall be fair in all the circumstances......For a long time, the Courts have without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary, for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation".

51. In *Pearlberg* v. *Varty*[3], another decision of the House of Lords, Lord Dilhorne quoted the above passage from Lord Reid and proceeded to observe:

"I respectfully agree. I would only emphasise that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair. One should rather assume that that has been done is fair until the contrary is shown".

1. (1969) 121 C.L.R. 509, 524.
2. (1971) A.C. 297.
3. (1972) 1 W.L.R. 534.

52. In our view, the Land Acquisition Act is a piece of legislation wherein is to be found not merely the policy of the Government to acquire lands for public purpose, but also the means for giving effect to such a policy. In this situation, our function as a Court in relation to this enacted law is limited to interpreting and applying its provisions. In the task of interpretation it is necessary for us to ascertain what the means are which the Legislature has enacted for the purpose of achieving its policies. Having ascertained those means, effect must be given to those means and to no other. We do not conceive it to be our function to add to the means which the Legislature has enacted merely on the score that the provisions do not fulfil to perfection the dictates of natural justice.

53. We may quote the following general observations of Lord Diplock in *Director of Public Prosecutions* v. *Bhagwan*[1], on the scope of judicial construction of statutes interfering with subject's rights. The observations were made in a different context while considering a different statutory situation, but we feel that they are apposite to the present purpose:

"Under our system of Parliamentary Government what Parliament enacts are not policies but means for giving effect to policies. Those means often involve imposing on private citizens fresh obligations or restrictions on their liberties to which they were not previously subject at common law. The constitutional function of the Courts in relation to enacted law is limited to interpreting and applying it. It is the duty of the Judge to ascertain what are the means which Parliament has enacted by the Act. In construing the enacting words he may take account of what the Act discloses as the purpose that those means were intended to achieve and, in the case of ambiguity alone, he may interpret them in the sense in which they are more likely to promote than hinder its achievement. But it is no func-

1. (1970) 3 All E.R. 97 at 106.

tion of a Judge to add to the means which Parliament has enacted in derogation of rights which citizens previously enjoyed at common law, because he thinks that the particular case in which he has to apply the Act demonstrates that those means are not adequate to achieve what he conceives to be the policy of the Act. To do so is not to carry out the intention of Parliament but to usurp its functions. The choice of means is itself part of the Parliamentary choice of policy. It represents the price, by way of deprivation of freedom to do or not to do as the wish, which Parliament is prepared to exact from individual citizens, to promote those objects to which the Act is directed. To raise the price is to change the policy, not to give effect to it. If the policy is to be changed, it is for Parliament, not the Courts to change it. ....."

54. For the reasons stated above we do not feel persuaded to imply in the provisions of section 4 (1) and section 5-A of the Act, the necessity for issuing individual notices to persons aggrieved, promoted by consideration of natural justice. This means that the writ petitioners cannot make a grievance of not having been individually served with notices of acquisition.

55. On these conclusions of ours we must reject the ruling of Palaniswami, J., in *Easwara Pillai* v. *State of Madras*[1], as unacceptable. The learned Judge had referred in his judgment to two earlier decisions of learned single Judges of this Court, both of them unreported. One of them was rendered by Kailasam, J. (as my Lord the Chief Justice then was) in *Meclec Nutriments & Pharmaceuticals Ltd.* v. *The State of Madras by the Secretary to Government, Home Department, Madras and another*[2]. The other was by Ramakrishnan, J., in *The Associated Equipment Services (Registered) Partnership firm by its Partner K. P. Subramaniam* v. *The State of Madras, represented by the Tahsildar for Land Acquisition Special Indian Institute of Technology having his office at Saidapet, Madras-15*[1]. Palaniswami, J., felt that neither decision laid down the law correctly and, in that view felt free to differ from them. As we shall show presently, the views expressed in the two unreported decisions eminently merit acceptance both on principle and on precedent.

56. The earlier of the two unreported decisions arose in a case where the owner contended that there was no proper publication of the notification under section 4 (1) of the Act. It was further contended that the property notified for acquisition was under mortgage, and the Collector should have given notice personally to the mortgagee. Dealing with the latter contention Kailasam, J. observed:

"Regarding the contention that there was no proper notice to the petitioner or to the Hyderabad Investment Trust, it has to be mentioned that neither section 4 (1) nor section 9 (1) contemplates service of any personal notice on the owner or occupier of the land that is sought to be acquired."

57. Referring to the nature and scope of the notice under section 4 (1), it was observed:

"The notice contemplated at this stage is only a public notice at convenient places in the locality."

58. Elaborating the theme at a later part of the judgment, it was observed as follows:

"The plea of the learned counsel for the petitioner that section 4 (1) read with section 45 contemplates service of notices on the person in occupation or interested in the property cannot be accepted for there is no mention of service of any personal notice under section 4. What is contemplated under section 45 is that service of any notice under this Act shall be made by deli-

1. (1972) 1 M.L.J. 92: 85 L.W. 894.
2. W. P. No. 1846 of 1965 dated 7th February, 1966.

1. W.P. Nos. 1734, 1770 and 1771 of 1967, dated 27th July, 1967.

vering or tendering a copy thereof signed, in the case of a notice under section 4, by the officer therein mentioned. The proviso to section 4 (2) states that no person shall enter any building without giving the occupier at least seven days notice in writing of his intention to do so. So far as the notice under section 4 (1) is concerned, it is not required that it should be served on any person."

59. In this view, among other considerations, the writ petition in that case was dismissed. The comment of Palaniswami, J., on the above decision is that there was no consideration by the learned Judge of the executive instructions and the Board Standing Orders bearing on the subject of notice under section 4 (1). We have earlier expressed the view that those instructions have no legal efficacy. On the terms of section 4 (1) the views expressed in the above unreported judgment are those with which we fully agree.

60. Ramakrishnan, J., in the course of his judgment in the other unreported case referred to by us, adverted to the Rules made by the State Government under the Land Acquisition Act. He observed that "these Rules prescribe only for the publication of notices at convenient places in the locality, in the office of the Collector, the Tahsildar and in the nearest Police Station. But individual notices to the persons interested in the land are not enjoined either by the Statute or the Rules." While concluding, Ramakrishnan, J., referred to the earlier unreported decisions of this Court in these terms: "That such individual notices are not obligatory is the view held by this Court in earlier decisions: *Vide* unreported decisions in W. P. Nos. 1846 of 1965 and 219 of 1963. The learned Judge also adverted to the executive instructions on the subject found at pages 41 and 85 of the Land Acquisition Manual, but the learned Judge's view seemed to be that the provision of individual notices in those instructions was only "by way of abundant caution". It is not clear as to what the learned Judge meant to indicate by this description. It is, however, quite clear that the learned Judge was not prepared to quash the proceedings merely on the basis of the executive instructions, considering the view he had expressed as to the scope of section 4 (1) of the Act and rule 1 of the Madras Land Acquisition Rules on the subject of notice.

61. While referring to the above decisions, Palaniswami, J., expressed the criticism that the learned Judge had not adverted to the terms of the statutory form of notice to be issued under section 5-A of the Act. This is, no doubt, true, but, in our view, the statutory form of notice referred to by Palaniswami, J., does not lead to the conclusion that the Act contemplates individual notices to be observed on the persons interested even at the stage of section 4 (1) notification. The learned Judge himself concedes that "section 5-A does not say that before holding an inquiry the Acquisition Officer should issue notice to the persons interested". Form 3 is not a statutory form. Even Form 3, printed at page 262 of the Land Acquisition Manual cannot bear the inference which the learned Judge has drawn from its contents. The form of notice no doubt calls upon "all persons interested in the land are accordingly required to lodge within 30 days from the date of publication of the above notification a statement in writing...... etc." But there is nothing in the form to suggest that the notice in that form should actually be issued to each and every one of the persons interested in the land. From the mere aspect of that which has been prescribed as the subject-matter of any given notice, we cannot proceed to draw any conclusion as to the mode of service of that notice. The content of a notice is one thing: the mode of service of that notice is quite another. If the Rules had really contemplated individual service of notices on all potential objectors under section 5-A it should have been the easiest for the rule-making authority to have so prescribed in explicit terms. However much the language of Form 3 can be strained, it cannot, in our opinion, lead to the inference that notice in that form must be sent to all the persons interested in the land.

62. In view of the above considerations, we hold that the views expressed in the two unreported decisions of this Court are to be preferred to those found in *Easwara Pillai* v. *State of Tamil Nadu*[1].

63. The last submission made by the learned counsel for the petitioners relates to a subsequent stage of the acquisition proceedings, namely, the stage of what is popularly termed as "the award inquiry." Learned counsel complained that the notices for the award inquiry were not properly served on his clients. The provisions regarding the award inquiry are to be found in sections 9 and 10 of the Land Acquisition Act. Section 9 deals with notices to persons interested. It provides that the Collector shall give public notice at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land and that claims to compensation for all interests in such land may be made to him. Section 9 (2) requires that the public notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place mentioned therein and to state the nature of the interest in the land and the amount and particulars of their claim to compensation for such interests, as well as their objections, if any, to the measurements. Section 9 (3) contemplates that individual notices must be served on the occupier of the land and on all persons known or believed to be interested in the land. Sub-section (4) provides that in the event of any such person residing elsewhere and having no agent in residence at the locality, then the notice will have to be sent to him by registered post addressed to him at his last place of residence of place of business. Section 45, which specifically deals with modes of service of individual notices, enacts that service of any notice under this Act shall be made by delivering or tendering a copy of such notice. It further says that whenever practicable, service of the notice shall be made on the persons therein named. But when such person cannot be found, service may be made on any adult male member of his family residing with him, and if no such adult male member can be found, the notice may be served by affixing the notice on the outer door of the house in which the person therein named ordinarily dwells or carries on business, or by affixing a copy thereof in some conspicuous place in the office of the Collector or in the Court-house, and also in some conspicuous part of the land to be acquired. Provision is also made, at the Collector's discretion, to send notice by registered post to the person sought to be served, addressing him at his last known residence or place of business. The section provides that production of postal acknowledgment would be good proof of service in such cases.

64. In the present case, the facts relating to the service of the notices of the award inquiry are to be found from the counter-affidavit filed by the Special Tahsildar. He states that notices under sections 9 (1) and 10 of the Land Acquisition Act and 9 (3) and 10 were published and served on all the interested persons in accordance with the Statute. In so far as the petitioner Padmavathi in W.P. No. 746 of 1972 is concerned, it is stated that since she was out of Coimbatore, the notice under section 9 (3) was served by affixture. In the case of the other petitioner in W.P. No. 889 of 1972, the counter-affidavit filed by the Deputy Secretary to Government, Education Department states that the notice under sections 9 (1) and 10 and 9 (3) of the Act were published and served on all the interested persons in accordance with the terms of those provisions. As for the notice directed to Bheema Raju, it is stated that the notice intended for him was received by his father, Chinnaswami Chettiar, who acknowledged the receipt of the notice on behalf of his son.

65. The above facts set out in the respondents' counter-affidavits have not been controverted before us. However, it is the case of both the writ petitioners that the notices were not actually served on them personally. Padmavathi, in her affidavit in support of her Writ Petition

1. (1972) 1 M.L.J. 92; 85 L.W. 894.

No. 746 of 1972, states that the land, which is the subject-matter of acquisition in T. S. No. 3978, Oppanakkara Street, Coimbatore Town is owned by 10 persons, being herself, her three sisters, her five brothers and her mother, all of whom are entitled to the property as co-heirs of her father. She further states that while a portion of the premises had been let out to a tenant, the remaining portion "is set apart for our personal occupation as and when we visit Coimbatore where our mother Kamalammal is permanently residing there". Bheema Raju, in his affidavit in W.P. No. 889 of 1972, states that T. S. No. 3980 of Oppanakkara Street, Coimbatore Town, in which he is interested as a co-owner, belongs to his family consisting of 7 members, namely, the petitioner's father, the petitioner, his brother and four sisters. He further states that a portion of the house property had been let out to a tenant, and in the remaining portion the petitioner's family is permanently residing. It is further stated that a portion of the premises is set apart for the petitioner's sisters whenever they visit Coimbatore Town.

66. We are satisfied that the services of notices under section 9 (3) read with section 45 have been validly made on the petitioner on the basis of their own affidavits in support of the writ petitions. Section 45 (3) provides that when a person named in the notice cannot be found, service may be made on any adult male member of his family residing with him. On the admission made by Bheema Raju that his father was residing with him in his family house service of notice on the father is a valid service of notice on the petitioner himself. In the case of Padmavathi, since she was not found in the residence at the time when the notice was sought to be served on her, the notice-server affixed a copy of the notice at the residence. It was argued that the house in question was not her residence, but this cannot be accepted, in the face of the admission made by her in the affidavit that whenever she visited Coimbatore she used to stay in the house and a portion in the house was specially reserved for such stay. Law does not say that a person can have only one ordinary residence. A person can have more than one ordinary residence, and service of notice at any one of the residences would be good service under section 9 (3) read with section 45. In these circumstances the contention that service of notice under section 9 (3) was not proper must also be rejected as untenable.

67. It would be appreciated that the contentions raised by the petitioners are all in the nature of mere procedural wrangles. The writ petitioners have not raised before us any contention either that the purpose of the acquisition is not a public purpose, or that the land sought to be acquired would not be suitable for that public purpose. Undoubtedly, the expansion of the Municipal elementary school must fall within the conception of a public purpose. Undoubtedly, again, the requirements of expansion can be fulfilled in this case in no other way then by acquiring the adjacent lands on either side of the existing premises, short of asking the school to shift its present premises bag and baggage and plant it elsewhere in the Town. Perhaps because the petitioners have no case on merits, they have been hard put to it to raise technical contentions, concerning notice, service, etc., which after consideration we have rejected in the foregoing paragraphs.

68. In the circumstances, the writ petitioners are dismissed, but again in the circumstances, without costs.

R.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman and V. Balasubrahmanyan, JJ.*

Booraswami .. *Appellant**

v.

Rajakannu and others .. *Respondents.*

(A) *Registration Act* (*XVI of* 1908), *sections* 17 (1) (b) *and* 49 (c)—*Unregistered partition deed—Can be looked into for finding whether there was division in status — Evidence Act, section* 91 — *Terms of a document reduced to writing—No oral evidence admissible in proof of terms—Factum of partition can be proved by oral evidence.*

(B) *Stamp Act* (*II of* 1899), *section* 35 —*Deed of partition not stamped—Stamped and validated subsequently—Effect.*

Section 17 (1) (*b*) of the Registration Act provides that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right or title or interest, of the value of one hundred rupees and upwards, to or in immovable property shall be registered. The bar under section 49 (*c*) is only to the reception of the relevant document as evidence of any transaction affecting such property, but not for other purposes. The bar against receiving the unregistered document in evidence is not absolute and it could be looked into for certain collateral purposes. A collateral transaction would mean a transaction other than the transaction affecting the immovable property. It is clear from the decided cases that an unregistered partition document could be looked into for the purpose of finding out whether there has been any division in status. [*Paras*. 8, 10.]

Section 91 of the Indian Evidence Act provides that where the terms of a document have been reduced to writing no evidence shall be given in proof of the terms of the said document. The oral evidence barred under section 91 is the evidence of the terms. Oral evidence can be looked into for finding out the division in status and the nature of the possession. Oral evidence which consists of admissions can also be looked into for the purpose of finding out the nature of the possession in the hands of the respective parties. Any amount of admission in the pleading though it may create estoppel cannot confer title. When the admission in the deposition is relied on only for the purpose of showing the character of the possession of the respective parties the bar under section 91 of Evidence Act and section 35 of Stamp Act has no application. [*Paras*. 13, 14.]

Cases referred to:—

Varada Pillai v. *Jeevarathnammal*, (1920) I.L.R. 43 Mad. 244: 46 I.A. 285: 38 M.L.J. 313: A.I.R. 1919 P.C. 44; *Kumaraswami Goundar* v. *Aravagiri Gounder*, (1974) 1 M.L.J. 413: 87 L.W. 215: A.I.R. 1974 Mad. 239; *Mst. Rukhmabai* v. *Lala Laxminarayan*, 1960 S.C.J. 433: (1960) 2 S.C.R. 253: A.I.R. 1960 S.C. 335; *Nanni Bai v. Gita Bai*, 1958 S.C.J. 925: 1959 S.C.R. 479: A.I.R. 1958 S.C. 706; *Subbu Naidu* v. *Varadarajulu Naidu*, I.L.R. (1947) Mad. 694: (1947) 1 M.L.J. 90: 60 L.W. 135: A.I.R. 1948 Mad. 26; *Velusami and another* v. *Velusami Konar and others*, (1961) 2 M.L.J. 20: A.I.R. 1962 Mad. 153; *Chinnappareddigari Pedda Muthyalareddy* v. *Chinnappareddigari Venkatareddy and others*, (1969) 1 An.W.R. 396; *K. Kanna Reddy* v. *K. Venkata Reddy*, (1965) 1 An.W.R. 384; *Yasodammal* v. *Janaki Ammal*, (1968) 1 M.L.J. 249: 81 L.W. 2: I.L.R. (1968) 2 Mad. 382: A.I.R. 1968 Mad. 294; *Ram Rattan* v. *Parma Nand*, (1946) 1 M.L.J. 295: 73 I.A. 28: 59 L.W. 196: A.I.R. 1946 P. C. 51; *Nalam Ramayya and others* v. *Nalam Achamma*, I.L.R. (1945) Mad. 160: (1944) 2 M.L.J. 164: 57 L.W. 472: A.I.R. 1944 Mad. 550; *Alluri Venkatapathi Raju and another* v. *Dantuluri Venkata*

* Appeal No. 252 of 1973 and C.M.P. No. 4311 of 1977. *15th July*, 1977.

Narasimha Raju and others, (1936) 71 M.L.J. 558: 63 I.A. 397: A.I.R. 1936 P.C. 264.

Appeal No. 252 of 1973: Appeal against the decree of the Court of the Subordinate Judge, Chidambaram in Original Suit No. 107 of 1969.

Civil Miscellaneous Petition No. 4311 *of* 1977: Petition presented to record respondents 4 to 8 in the above Appeal No. 252 of 1973 and legal representatives of the deceased 2nd respondent in the above said appeal.

K. Sarvabhauman and *K. Sampath,* for Appellant.

G. T. Ramanujachari and *V. Ratnam,* for Respondents.

The Judgment of the Court was delivered by

Sethuraman, J.—This is an appeal filed by the plaintiff in O.S. No. 107 of 1969 on the file of the Court of the Subordinate Judge of Chidambaram. There was one Rengasami Vandayar, who died in or about 1940. His four sons are Booraswami, the plaintiff, Rajakannu, the first defendant, Chinnadurai, the second defendant and Dharmalinga, the third defendant. He owned certain properties. According to the plaintiff the four sons of Rengasami Vandayar were living as members of a Hindu undivided family till about 1964. In that year there was a division of the movables and the respective brothers started separate messes. The parties were, it is said, put in possession of the properties of the joint family for the purpose of convenient enjoyment. The second defendant was alleged to have entered into partition with his sons, defendants 4 to 6, later on under which some of the joint family properties were sought to be divided. According to the plaintiff, some properties had been purchased in the names of defendants 4 to 8 out of joint family funds. The plaintiff, therefore, issued a registered notice to the defendants on 1st September, 1969 to have all the joint family properties divided and allotted by metes and bounds. There was no reply and the plaintiff, therefore, came forward with the present suit for partition and separate possession of his ¼th share in the suit properties.

2. The third defendant filed a written statement, which was adopted by the first defendant. He admitted that the joint family owned the immovable properties set out in the plaint, and claimed ¼th share in the said properties. According to the third defendant there were other properties also, which were divisible among the brothers.

3. The second defendant in his written statement denied that the parties were members of a Hindu undivided family. His plea was they had already become divided and were in possession and enjoyment of their respective properties. It was claimed that the properties described in the II schedule to the plaint were not the joint family properties, that they belonged separately to his branch and that the outstandings set out in the third schedule belonged to his branch. According to the second defendant, a son was born to him by name Jayaramachandran and on 23rd August, 1948, there was a registered deed of settlement marked as Exhibit B-1 under which the properties were settled on his minor son with reservation of provision for maintenance by the four brothers. He was put in possession of the said property. However on 22nd September, 1960, he executed a release deed in favour of the first defendant in respect of some of the properties in his enjoyment and the first defendant similarly executed a release deed relinquishing his rights in the remaining properties. On 10th January, 1962, three lists were drawn allotting the properties, which remained after excluding the properties allotted to the first defendant, among the three brothers, *viz*., the plaintiff and defendants 2 and 3 and the parties have been in possession and enjoyment of the respective properties making alienations and exchanges among themselves and others. This written statement was adopted by defendants 5 to 8, except the seventh defendant, who filed a separate written statement making his claims with reference to certain of the properties as individual properties.

4. The learned Subordinate Judge framed several issues, the main one being whether the properties described in schedules I, II and III were joint family properties and whether the partition said to have been effected in 1962 was true. After considering the evidence placed before him, the learned Subordinate Judge held that the properties described in schedule I were ancestral properties, that some of the properties described in schedule II had been purchased out of ancestral nucleus and that the partition in 1962 pleaded by the second defendant was true. As this was a case in which there was a division in status even in 1962, the suit for partition, as if there was a joint family in existence, was not proper and, therefore he dismissed the suit. The plaintiff has, filed this appeal.

5. The learned counsel for the appellant (plaintiff) contended that the partition said to have been effected on 10th January, 1962, was under Exhibit B-12, which was an unstamped and unregistered document, that the said document could not, in law, he received in evidence and that the properties continued to remain joint family properties available for division under the present proceedings. The learned counsel took us through the pleadings and the evidence and also cited several authorities in support of his submission.

6. We have, therefore, to consider first whether there was a division among the members of the family in 1962 as alleged by the second defendant. In this context, the question of the admissibility of Exhibit B-12 comes up for consideration. Before considering the admissibility of Exhibit B-12, we shall first consider the facts. The second defendant in his written statements has stated in paragraph 2 therein that the parties had all become divided and were in separate possession and enjoyment of their respective properties and were all living separately. This plea appears to be correct. After referring to Exhibit B-1, which was a settlement deed, dated 23rd August, 1948, which had been only registered and which apparently had not been given effect to, the second defendant pointed out that on 22nd September, 1960, there were two release deeds, Exhibit B-2 and Exhibit B-3 one executed by the second defendant as guardian of his minor son in favour of the first defendant and the other executed by the first defendant relinquishing his rights with reference to the properties not covered by Exhibit B-2. Exhibits B-2 and B-3, which were entered into on the same date, thus resulted in the first defendant walking out of the family with certain properties. It is nobody's case that there was any division among the other parties on 22nd September, 1960. The second defendant has stated in paragraph 4 of his written statement that three lists were drawn on 10th January, 1962 allotting the properties excluding those covered by Exhibits B-2 and B-3 among the three brothers and the lists were accepted by all the three brothers and that they were put in separate enjoyment of the said properties. This is borne out by the oral evidence also. According to him (the second defendant) the properties described in the second schedule had been purchased out of the individual resources available to his branch. The third defendant supported the case of the plaintiff. However, it is found that after 1962 the second defendant had sold some of the properties which he got and he purchased others in his name and in the names of his sons. The plaintiff, the second defendant and the third defendant have been paying kist for the respective properties allotted to them separately. Each one of them is enjoying the properties separately without rendering any account to the other as would have been the case if the properties continued to be joint. The plaintiff in his deposition as P.W. 1 has himself admitted that it was true that there was a division of the properties in 1962 in their family and that they have been enjoying the properties in accordance with the same. He stated in his deposition that the plaintiff did not get his 1/4th share actually, obviously meaning that the allotment was unequal. There was a division on 11th August, 1965 between the members of the family of the second defendant under Exhibit B-9. The properties covered by Exhibit B-9 are those that had been allotted

to his branch in the division in January, 1962. The third defendant had exchanged certain properties obtained by him in the partition in January, 1962 with some properties from Jayaramachandran, the fourth defendant, the son of the second defendant. Exhibit B-7, which is the said exchange deed confirms and corroborates the partition under Exhibit B-9 between the second defendant and his sons. It is also admitted by the third defendant, who gave evidence as D.W. 2, that the second defendant had sold some properties and purchased others and that he never raised any objection to the same. In Exhibit B-8, which is the document executed between defendants 2 and 3, there is a reference to the earlier division and it is stated that the properties described in schedules A and B in Exhibit B-8 and certain others had been divided and the document had not been registered, and that in the properties described in schedules A and B to Exhibit B-8, the other brothers did not have a share. Thus, there is a consistent conduct in the shape of separate enjoyment and possession of the properties and in the shape of alienations made by defendants 2 and 3, which confirmed and corroborated the partition effected in 1962. Even in the evidence of the plaintiff as P.W. 1, there are admissions to show that certain lists were prepared in January, 1962 and that there was a partition in that year. The actual words used are as follows:

> "*1962ல் எங்களுக்குள் ஓர் பாகப் பிரிவினை ஏற்பாடாச்சு....* 2nd defendant *தனியாக தீர்வை செலுத்தினால்* 3rd defendant *தனியாக தீர்வை செலுத்துகிறார். சொத்துக்களையும் நாங்கள் தனித்தனியாகத் தான் அனுபவித்து வருகிறோம்.... 1962க்குப் பின், அவர் அவர்கள், சாகுபடி செய்து வந்த அவர் அவர்கள் வருமானத்தை அவர் அவர்கள் தான் எடுத்துக் கொண்டார்கள் நான் சாகுபடிசெய்த வருமானத்தை நான்தான் எடுத்துக்கொண்டேன். 1962 அட்டவணைக்கு பிறகு, சின்னதுரை* (2nd defendant) *தனக்கு விட்ட சொத்துக்களை பாராதீனங்கள் செய்துகொண்டும், புதிதாக சொத்துக்கள் வாங்கிக் கொண்டும், வந்திருக்கிறார்......எங்கள் குடும்பத்தில் 1962ல் சொத்துக்கள் எல்லாம் பாகம் பிரித்து ஆளுக்கு ஒரு லிஸ்டு கொடுத்தது வாஸ்தவம் தான். அதன்படித்தான் அனுபவித்து வருகிறோம்*".

These statements in the evidence of P.W. 1 himself clearly confirm the partition that had been effected in 1962.

7. The learned counsel for the appellant contended that the admissions as such, would be of no avail, that the partition is founded on a document of 10th January, 1962 and, that the said document being unstamped and unregistered cannot be revived in evidence. If the said document is left out of consideration in accordance with law, then oral evidence also cannot, it is submitted, be given in order to describe the terms of the partition. If the oral evidence is also eschewed, then according to the learned counsel, the family would continue to be joint so that the present suit would be proper.

8. The real point is whether Exhibit B-12 could be looked into for any purpose. Section 35 of the Stamp Act on which reliance is placed by the learned counsel for the appellant provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Under clause (*a*) of the proviso it is enacted that any such instrument (except those specifically mentioned therein) shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of insufficiently stamped instrument on payment of the amount required to make up such duty, together with a penalty as described therein. In the present case the learned Subordinate Judge has pointed out that the stamp duty and penalty had been paid by the second defendant. Therefore, the bar under the main part of section 35 of the Indian Stamp Act can no longer apply. We have thus to consider the objection to the admissibility of Exhibit B-12 in

the light of section 49 read with section 17 (1) (*h*) of the Indian Registration Act. Section 49 provides as follows:

> "49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—
>
> (*a*) affect any immovable property comprised therein, or
>
> (*b*) confer any power to adopt, or
>
> (*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

Section 17 (1) (*b*) provides that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, of the value of one hundred rupees and upwards, to or in immovable property shall be registered. Thus, the bar under section 49 (*c*) is only to the reception of the relevant document as evidence of any transaction affecting such property, but not for other purposes.

9. The admissibility of the unregistered partition list or document has come up for consideration in a large number of cases. The Privy Council in *Varada Pillai and another* v. *Jeevarathnammal*[1], had to deal with a case where a mitta belonged to two brothers, Gopalakrishnan and Parthasarathy in equal shares and on the death of Gopalakrishnan his share vested in his widow, Rajammal. He had a daughter by name Duraisani. Parthasarathy left a will giving his share of mitta absolutely to his wife Alangarammal. In 1895 Rajammal and Alangarammal, who were the then registered owners of the two moieties of the mitta, presented a petition to the Collector whereby after reciting that they had given away the two villages constituting the mittas as *stridhanam* to Duraisami on 8th October, 1895, had prayed that orders might be passed for transferring the villages in her name. Duraisani presented a petition for mutation in her name in accordance with the gift in her favour on 8th October, 1895. There was, however no document of gift in her favour. The plaintiffs who were the reversioners on the death of Alangarammal, filed a suit contending that the moiety of Parthasarathy was, in fact, undisposed of on the death of Alangarammal and that in spite of mutation in favour of Duraisani, the properties were not validly transferred in favour of Duraisani. The Judicial Committee of the Privy Council confirmed the High Court's conclusion holding that Duraisani, although she had not acquired any legal title under the gift of 8th October, 1895 or the petition to the Collector dated 10th October, 1895, in fact took possession of the property when it was transferred to her and that she retained such possession until her death in 1911 after which it passed to one Jeevarathnammal as her heir or successor. At page 251, their Lordships stated as follows:

> "It should be added that, although the petition of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani".

10. It is clear from the decision of the Privy Council that the bar against receiving an unregistered document in evidence is not absolute and it could be looked into for certain collateral purposes. A collateral purpose is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. Thus, a collateral transaction would mean a transaction other than the transaction affecting immovable property. As pointed out by Ismail, J., in *Kumaraswami Goundar* v. *Aravagiri Gounder*[1], in the case of an express or completed partition there

1. (1920) I.L.R. 43 Mad. 244: 46 I.A. 285: 38 M.L.J. 313: A.I.R. 1919 P.C. 44.

1. (1974) 1 M.L.J. 413: 87 L.W. 215: A.I.R. 1974 Mad. 239.

would be three different stages: (*i*) the stage of effecting a division in status; (*ii*) the stage of dividing the properties by metes and bounds; and (*iii*) the stage of each party taking possession of the properties allotted to his share. As far as these three stages were concerned, having regard to the decided cases, each and every one of them could be effected orally without there being a document. Even if there was a written document in respect of the first and third stages, the document does not require registration because neither the division in status nor the actual taking possession of the properties can be said to create, declare, design, limit or extinguish any right, title or interest to or in immovable property. The Supreme Court has pointed out in *Mst. Rukhmabai* v. *Lala Laxminarayan and others*[1], as follows:

> "Doubtless an unregistered document can effect separation in status:"

In an earlier case reported in *Nanni Bai and others* v. *Gita Bai*[2]. The Supreme Court had occasion to consider the question as to whether the division in status could be established by an unregistered document. At page 713, Sinha, J., as then was, observed as follows:—

> "Partition in the Mitakshara sense may be only a severance of the joint status of the members of the coparcenary, that is to say, what was once a joint title, has become a divided title though there has been no division of any properties by metes and bounds. Partition may also mean what ordinarily is understood by partition among co-sharers who may not be members of a Hindu coparcenary. For partition in the former sense, it is not necessary that all the members of the joint family should agree, because it is a matter of individual volition. If a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family that effects a partition so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy, has been converted into a tenancy in common. For partition in the latter sense of allotting specific properties or parcels to individual coparceners, agreement amongst all the coparceners is absolutely necessary. Such a partition may be effected orally, but if the parties reduce the transaction to a formal document which is intended to be the evidence of the partition, it has the effect of declaring the exclusive title of the coparcener to whom a particular property is allotted by partition, and is, thus, within the mischief of section 17 (1) (*b*), the material portion of which has been quoted above. But partition in the former sense of defining the shares only without specific allotments, of property, has no reference to immoveable property. Such a transaction only affects the status of the member or the members who had separated themselves from the rest of the coparcenery. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property, may be effected orally or it may be brought about by a document. If the document does not evidence any partition by metes and bounds, that is, to any, the partition in the latter sense, it does not come within the purview of section 17 (1) (*b*), because so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. Such a transaction does not purport to operate or do any of the things referred to in that section. Hence, in so far as the documents referred to above are evidence of partition only in the former sense, they are not compulsorily registrable under section 17, and therefore, do not come within the mischief of section 49 which prohibits the reception into evidence of any document "affecting immoveable property". It must, therefore, be held that those documents have rightly

1. (1960) 2 S.C.R. 253: 1960 S.C.J. 433 at 437: A.I.R. 1960 S.C. 335.

2. 1958 S.C.J. 925 : 1959 S.C.R. 479 : A.I.R. 1958 S.C. 706.

been received in evidence for that limited purpose".

It is thus clear that the unregistered document could be looked into for the purpose of finding out whether there has been any division in status.

11. This very question has been considered by a Bench of this Court in *Kumaraswami Goundar* v. *Aravagiri Gounder*[1], to which we have made reference already. In that case there was a division between two brothers under a document dated 24th November, 1924. But that document had not been registered. A suit was filed by one of the two brothers claiming that the properties had not been partitioned. The other brother, who was the defendant, contended that there was a final partition on 24th November, 1924, that pursuant to that partition the parties had taken possession of the respective items allotted to them and that they were in complete and absolute enjoyment of those properties. He relied also on a series of alienations subsequent to that partition. The question before this Court was whether the said document could be looked into for the purpose of finding out the division in status and the character of the possession. After elaborately examining the earlier cases, the learned Judges held as folows:—

> "Therefore, we hold that Exhibit B-1 is admissible for the collateral purpose, namely, to determine the nature and character of the possession and that the other materials on record could also be taken into consideration for the purpose of coming to a decision that the possession of the properties in question by Nallaswami Goundan was referable to a division of the properties between the parties concerned................"

To the same effect are two earlier decision of this Court in *Subbu Naidu* v. *Varadarajulu Naidu*[2] and *Velusami and another* v. *Velusami Konar and others*[3]. It follows from these decisions that the document could be looked into for the purpose of finding out also the character of the possession of the plaintiff and defendants 2 and 3 of the respective properties.

12. We may add that an identical conclusion has also been reached by a Full Bench of five Judges of the Andhra Pradesh High Court in *Chinnapareddigari Pedda Muthyalareddy* v. *Chinnappareddigari Venkatareddy and others*[1]. In that case one Venkatareddy filed a suit for partition and for delivery of a half share of the family properties to him. His brother Muthyalareddy resisted the suit contending that they became divided in status 50 years ago, that partition lists were drawn up showing the properties allotted to the respective sharers and that the suit for partition was not maintainable. The lists were construed as partition deeds and as they were unregistered, they were held by the trial Court to be inadmissible in evidence for proving division by metes and bounds. No oral evidence was held to be admissible under section 91 of the Evidence Act to prove the factum of partition or the nature of possession. There was, therefore, a preliminary decree for partition. There was an appeal to the High Court and the contention was that the unregistered partition deeds could be looked into for the purpose of showing that there was a disruption in status and that no suit for partition would lie on the basis that the properties were still joint family properties. Jaganmohan Reddy, C.J., as he then was, delivering the judgment on behalf of the Full Bench held at page 407 as follows:—

> "In our view where a partition takes place, the terms of which are incorporated in an unregistered document, that document is inadmissible in evidence and cannot be looked for the terms of the partition. It is in fact the source of title to the property held by each of the erstwhile coparceners. That document, though unregistered, can however be looked into for the

1. (1974) 1 M.L.J. 413: 87 L.W. 215 : A.I.R. 1974 Mad. 239.
2. (1947) 1 M.L.J. 90: 60 L.W 135 : I.L.R. (1947) Mad. 694: A.I.R. 1948 Mad. 26.
3. (1961) 2 M.L.J. 20: A.I.R. 1962 Mad. 153.

1. (1969) 1 An. W.R. 396.

purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family who from thence onwards, hold it as co-tenants. It is now a well-established principle of Hindu law, as held by their Lordships of the Privy Council and the Supreme Court that for a severance in status, all that is required is a communication to the other members of the joint family, of an unequivocal intention to separate .... This communication of intention could be done orally or by a notice in writing to the other coparceners, or by other means depending upon the facts and circumstances of the case. If the intention is expressed by reducing the same to writing such a document, though unregistered, is admissible and can be looked into, as long as it is not the source of title of any of the properties which each of the erstwhile coparceners hold as a result of that partition".

In the same case the question as to whether oral evidence was inadmissible by reason of section 91 of the Evidence Act was also gone into and at page 409 it was stated as follows:—

"The Full Bench of this Court in *K. Kanna Reddy's case*[1], also took the view that oral evidence is admissible to provide the factum of partition, though it was not admissible to prove the terms of the partition. It is however unnecessary to consider this question in the view we have taken that the partition deed itself is admissible to prove the severance in status and in view of the severance in status, the suit for partition on the footing that the property is still joint family property is not maintainable, and will have to be dismissed accordingly".

13. In the present case we have already referred to the oral evidence in the shape of the admissions by P.W. 1. Learned counsel for the appellant submitted that the oral evidence should be left out of consideration because of the bar under section 91 of the Indian Evidence Act. We are unable to accept this submission. Section 91 provides that where the terms of a document have been reduced to writing, no evidence shall be given in proof of the terms of the said document. The oral evidence barred under section 91 is evidence of the terms. We are looking into the oral evidence here for finding out the division in status and the nature of the possession. We are in agreement with the Full Bench decision in *K. Kanna Reddy* v. *K. Venkata Reddy*[1], in holding that the unregistered document is admissible to prove the factum of partition though not the terms thereof and that oral evidence is also admissible for proving the factum of partition. The admissions in the pleadings have been taken into account in *Kumaraswami Gounder* v. *Aravagiri Gounder and another*[2]. Similarly the oral evidence which consists of admission in this case can also be looked into for the purpose of finding out the nature of the possession in the hands of the respective parties.

14. Learned counsel laid great store by a decision of a Bench of this Court in *Yasodammal and another* v. *Janaki Ammal*[3]. In that case there was an unstamped document. A suit was filed by the plaintiffs to establish their title to the suit property against the first defendant, who claimed rights over the same in pursuance of an agreement alleged to have been entered into between the plaintiffs and the first defendant to sell the suit property to the first defendant in April, 1949. That agreement had not been stamped and, therefore, the bar under section 35 of the Indian Stamp Act was pleaded against the reception of the said agreement as evidence. It was held by this Court that in the case of an unstamped document, as the prohibition contained in section 35 of the Stamp Act was wide and absolute, even though in the pleadings the contesting party may admit the execution of the unstamped

1. (1965) 1 An.W.R. 384.

1. (1965) 1 An.W.R. 384.

2. (1974) 1 M.L.J. 413: 87 L.W. 215: A.I.R. 1974 Mad. 239.

3. (1968) 1 M.L.J. 249: 81 L.W. 2: I.L.R. (1968) 2 Mad. 382: A.I.R. 1968 Mad. 294.

document, still no relief could be granted to the aggrieved party, on the basis of such admission, as it would amount to acting upon the unstamped document. It was, therefore, held that the defendant could not be awarded any relief under section 53-A of the Transfer of Property Act even assuming that the agreement was in writing and was wrongfully withheld by the plaintiffs. It may be seen that the problem in that case was whether the defendant could put forth an unstamped instrument as an evidence to resist the claim in a suit for declaration. The unstamped instrument could itself confer no title. It could not also be utilised for the purpose of getting any relief under section 53-A, as the said instrument could not be received in evidence under section 35 of the Stamp Act. It is in this context that even the admission in the pleadings was held to be of no avail. Any amount of admission in the pleadings, through it may create estoppel, cannot confer title. In the present case the defendant is not trying to obtain any relief in his favour, as was done by relying on section 53-A in the other case. The evidence of all the three parties *viz.*, the plaintiff and defendants 2 and 3 is uniform to show that there was a partition and the parties were put in possession of the respective properties. The admission in the deposition is relied on only for the purpose of showing the character of the possession of the respective parties. The bar under section 91 of Evidence Act and of section 35 of the Stamp Act has no scope for application in this context.

15. Our attention was drawn to a decision of the Privy Council in *Ram Rattan* v. *Parma Nand*[1]. That was also a case in which an unstamped and unregistered document was relied on as evidence in a suit for partition of the properties. The Privy Council held that section 35 prohibited the document from being looked at even for any collateral purpose. This is not a case of an unstamped instrument attracting the operation of section 35, because the document, as already pointed out, has been stamped. In the case before the Privy Council the schedule to the unstamped document was the basis of the declaration that the plaintiff was entitled to a half share in the properties described in the schedule. Regarding this aspect the Privy Council pointed out that in doing so, the document was not actually received as evidence and that the schedules were merely employed as a convenient means of identifying the properties admitted to be joint. It is unnecessary for our purpose to go further into this decision of the Privy Council, as the operation of section 35 of the Indian Stamp Act is not attracted.

16. The learned counsel for the appellant relying on a decision of the Full Bench of this Court in *Nalam Hamayya and others* v. *Nalam Achamma*[1], submitted that where a deed of partition was inadmissible for want of registration, the Court had to regard the property as still belonging to the joint family. In that case the plaintiff, a widow, sued for recovery of the properties. According to her the properties had fallen to the share of her husband on partition. The properties had admittedly formed part of the joint family properties of her husband and his brothers. According to her the partition was effected on 1st March, 1934 and her husband had then obtained possession of the properties. After her husband's death, she alleged that the brothers trespassed on the property and dispossessed her and that is how she came forward with a suit for recovery of possession. As the partition deed of 1934 had not been registered, it was held that the document could not be received in evidence. For ejecting the defendants in the said suit, it was necessary for her to prove her title. The want of registration of the deed of partition stood in the way of her succeeding in the suit. There is, no doubt, an observation that if an agreement for partition could not be proved, the Court could only regard the property as still belonging to the joint

1. (1946) 1 M.L.J. 295: 73 I.A. 28: 59 L.W. 196: A.I.R. 1946 P.C. 51.

1. I.L.R. (1945) Mad. 160: (1944) 2 M.L.J. 164: 57 L.W. 472: A.I R. 1944 Mad. 550.

family, and that one co-owner could not maintain a suit for trespass against another co-owner. It may be noticed incidentally that if the property belonged to a joint family, then there was no question of any co-owner maintaining a suit against another co-owner. A member of a joint family is not a co-owner in the legal sense and could not have sued another member for possession so long as the family continued to be joint. The very concept of a joint family involves the doctrine of unity of possession. The observations do not have the meaning contended for and have not also been understood in any later case as if the properties continued to belong to a joint family when once it was found that the deed of partition was unregistered.

17. Even assuming that the depositions could be looked into, the learned counsel for the appellant pointed out that the said depositions are generally disregarded in such cases because parties make statements to suit their own interest. In this connection, learned counsel for the appellant cited a decision of the Privy Council. In *Alluri Venkatapathi Raju and another* v. *Dantuluri Venkatanarasimha Raju and others*[1], the Judicial Committee was concerned with a case instituted by two grand-sons through the daughter of one Venkataraghava Raju, who was himself the son of one Krishnamraju. Their claim was that the properties covered by the said suit belonged to their maternal grandfather, as the heir of his father Krishnamraju and that Krishnamraju had become divided from his brothers. The plaintiffs could have succeeded only if they established that Krishnamraju had become divided from his brothers. If he had continued undivided, then the properties would have gone by survivorship to his brothers. Krishnamraju and his brothers had taken certain abkari licences. Rule 5 of the Rules governing the exclusive privilege of vending toddy prescribed that the holder of the licence should not hold or have any interest in the exclusive privilege of manufacturing and selling arrack in the part of the district to which his licence related. There was a similar prohibition in respect of the holder of a licence for selling arrack. The brothers had made statements before the revenue authorities to the effect that they were divided and that either of them was concerned only with particular business for which the exclusive licence had been obtained and that either of them was not concerned with the licence of the other. The question was whether the admission of the brothers that they were already divided showed that the properties had been obtained by Krishnamraju in a partition between himself and his brothers. It is in this context that the Judicial Committee pointed out that it sometimes happened that persons made statements which served their purpose or proceeded upon ignorance of the true position and that it was not their statements, but their relations with the estate, which should be taken into consideration in determining the issue. It is not clear as to how this case helps the appellants herein. The statements made in that case were not in the course of the very proceedings of the suit. Those statements had been made in the context of certain other enquiries. The statements made in connection with certain other enquiries will not stand in the same position as statements made in the very suit. The admissions in a suit have a greater validity and could under certain circumstances serve as a foundation for a decree even. The admissions made in the present case cannot also be taken as self-serving statements to suit to any particular occasion. In a case where this very question of division is in issue, if all the parties speak from the witness box that they have become divided and that they have been enjoying the properties separately, then we are at a loss to know why the Court should decline to act on them.

18. The learned counsel drew our attention also to a passage in *Mst. Rukhmabai* v. *Lala Laxminarayan and others*[1].

1 (1936) 71 M.L.J. 558 : 63 I.A. 397 : A.I.R. 1936 S.C. 264.

1. (1960) 2 S.C.R. 253 : 1960 S.C.J. 433.

We have already referred to this case in an earlier part of this judgment. That was a suit by one Laxminarayan for a declaration that the trust deed executed by his paternal uncle Govindprasad in favour of his brother Chandulal and cousin Rukhmabai was a sham document. In the proceedings the question arose whether Laxminarayan's uncle Govindprasad had become divided from his brothers. If he had become divided, the trust would have been a valid one, unless it was shown to be a sham document. In the said case also there was unregistered release deed in favour of the said Govindprasad by his brothers. There were also statements made in other proceedings. Some of the statements were conflicting and contradictory. It is in this context that the Supreme Court, after extracting a short passage from the decision of the Judicial Committee in *Alluri Venkatapathi Raju v. Dantuluri Venkatanarasimha Raju*[1], pointed out at page 447 as follows:

"These contradictory statements were made by one or other members of the family to meet a particular contingency or to get an advantage, and, therefore, these cannot be of much value and the case really falls to be decided not on such statements, but on the basis of the relations of the various parties with the estate".

Taking the relations of the various parties with the estate with which we are now concerned, it is clear that they have been enjoying the properties as divided members. There are no conflicting or contradictory statements which have to be reconciled in the present case. In these circumstances, we do not consider that is anything wrong in acting on the said admissions. The result is that the trial Court was right in dismissing the suit for partition. In fact, a suit for partition as in this case, on the basis of the existence of an undivided family cannot lie, when it is found that the parties have become divided and had been enjoying the properties separately and dealing with them as such.

19. Learned counsel for the appellant submitted that even assuming that the third defendant by dealing with the fourth defendant was in any manner estopped from contending that there was no partition, still such a plea was not open as against the plaintiff. We do not rest our conclusion on any plea of estoppel. We have taken into account the evidence that has been adduced in this case and particularly the statements in the witness box of the plaintiff and the third defendant who has a common case with the plaintiff, and we are satisfied that there was a division in January, 1962; that the respective parties took possession of the properties in their enjoyment subsequently and that they have been dealing with the said properties as if they were individual owners thereof. We make it clear that we are taking into account Exhibit B-12 only for the purpose of finding out the division in status and the character of the possession of the respective parties. There was no further dispute about any other conclusion or finding of the learned Subordinate Judge.

20. The appeal, therefore, fails and it is dismissed with costs. C.M.P. No. 4311 of 1977 for recording the legal representatives of the deceased 2nd respondent is ordered.

R.S. ——— *Appeal dismissed.*

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1. (1936) 71 M.L.J. 558 : 63 I.A. 397 : A.I.R. 1936 P.C. 264.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*V. Balasubrahmanyan, J.*

Mariyam Bivi and others ... *Appellants**

v.

Natharsa Rowther Trust by Trustee, S. A. Mohamed Jaffar ... *Respondent.*

Registration Act (XVI of 1908); section 60 (2)—Trust deed executed by N—N's son A alienating trust properties—Alienations challenged by grandson of N—Alienees' plea of trust deed not being properly registered—Deed executed by N on 26th June, 1920 presented for registration by agent on the same date — Registered only on 7th August, 1920—Alienees contending N was not alive on that date—Scope of section 60 (2)—Burden on party who challenges registration.

N executed a trust deed on 26th June, 1920. *A*, the son of *N* alienated the properties of the trust as though they were his own. After the death of *A*, *N's* grandson challenged the validity of the alienation made by *A*. The suit was decreed as prayed for and confirmed by the lower appellate Court. The alienees filed second appeals and contended that the trust deed though executed on 26th June, 1920 and presented for registration, it was registered only on 7th August, 1920, and that *N* had died before that date. So, according to the alienees, the trust deed was not validly registered.

Held: Under section 60 (2) of the Indian Registration Act, 1908, where registration was granted by any registering authority to any instrument, such certificate should be admissible for the purpose of proving that the document had been duly registered in the manner provided by the Act and that the facts set out by the registering authority in the endorsements made by him in the instrument had all occurred as therein mentioned. This provision, no doubt, enacted only a rebuttable presumption as to the facts relating to the validity of registration, but the effect of the provision, all the same, was to place the burden of proof squarely and unmistakably on the party who denied registration, or its validity. In the present case, the appellants' definite plea in the written statement was that *N* died within 15 days of the execution of the document. This was not made out at the trial by any evidence. Therefore, the contention that the registration of the trust deed was obtained by *N's* agent after his death had to be rejected. [*Para*. 6.]

To say that a trust might benefit by a breach of trust might be utilitarian, but a breach of trust was a breach of trust for all that. It would be subversive of the fundamental basis on which this jurisprudence rested for a Court to turn the Nelson eye to a breach of trust, if with the other eye it could find that the trust was not the worse off in consequence. On the contrary, the proper way the law deals with a breach of trust is to regard it as an evil in itself. [*Para*. 9.]

Appeal against the decree of the Court of the Subordinate Judge, Thanjavur in Appeal Suit Nos. 244 and 246 of 1974, preferred against the decree of the Court of the District Munsif, of Mannargudi in Original Suit Nos. 179 and 177 of 1972.

R. N. Kothandaraman and *G. Parasuraman*, for Appellants.

V. Ratnam, for Respondent.

The Court delivered the following

JUDGMENT.—These two second appeals raise a common question as to the validity of registration of a trust deed executed by one, Natharsa Rowther on 26th June, 1920. The question arises this way. The founder's son, Abdul Khader, succeeding as trustee, alienated the properties of the trust as though they were his own, not disclosing that they were inalienable trust properties. After Abdul Khader's death, the grandson of

*S.A. No. 2460 of 1975 and 1464 of 1976. 26th October, 1977.

the founder became trustee. Acting on behalf of the trust, he sued the alienees for a declaration and possession, contending that the alienations were void having been made in breach of trust. The alienees resisted the suits. One of the defences raised by them was that the trust itself was invalid since the deed of trust had not been validly registered. This contention, as well as others, were rejected by both the Courts below and the suits were decreed in favour of the trust as prayed for. The alienees have now come in further appeal before this Court.

2. Mr. R. N. Kothandaraman arguing for one of the alienees, the appellants, in S.A. No. 2460 of 1975, has repeated the contention that the registration of the original trust deed was invalid. His agrument contred round a narrow point. He conceded that the document was duly executed by Natharsa Rowther on 26th June, 1920. He conceded that it was duly presented for registration on the same day, 26th June, 1920, by the executant's agent. He conceded that the agent had been duly authorized to do so under a valid power of attorney, dated 25th June, 1920 executed by Natharsa Rowther. Granting all these, Mr. Kothandaraman, nevertheless contended that the registration was invalid, for, according to him, Natharsa Rowther was not alive on the date of registration, which was 7th August, 1920. Learned counsel said that Natharsa Rowther died within 15 days of the execution of the trust deed, on his way to Mecca during his sea voyage, and that the presentation of the document by the agent for registration and the subsequent registration were all done subsequent to the executant's death. It was accordingly urged that the registration was invalid.

3. I cannot accept learned counsel's contention as to the death of Natharsa Rowther, in the face of the finding of both the Courts below that the old man died only afer he returned to Bombay after successfully completing his pilgrimage. Both Courts accepted the oral evidence to this effect adduced by as many as four witnesses.

4. Mr. Kothandaraman pointed out that no certificate of death was filed by the trust to prove that the deceased had died in Bombay after his return from Mecca. But there is no law which says that death cannot be satisfactorily proved in a Court of law by oral evidence alone.

5. Mr. Kothandaraman then said that even the oral evidence adduced on behalf of the plaintiff-Trust did not give the exact date of death. According to him, it was upto the trust to establish that at the time of presentation of the document the executant was very much alive and it was only later that he had died. He urged that the onus of establishing that the registration was valid in the sense that it had been done during the lifetime of the executant was on the plaintiff-trust. He punctuated his argument by referring to sections 101 and 102 of the Evidence Act.

6. I must, however, reject the above arguments. I do so, not in derogation of the rules of evidence quoted by learned counsel, but in affirmation of a special rule of evidence, appropriate in this case, found in section 60 (2) of the Indian Registration Act, 1908. Under this provision, where registration is granted certificate shall be admissible for the purpose of proving that the document had been duly registered in the manner provided by the Act and that the facts set out by the registering authority in the endorsements made by him in the instrument had all occurred as therein mentioned. This provision, doubtless enacts only a rebuttable presumption as to the facts relating to the validity of registration, but the effect of the provision, all the same, is to place the burden of proof squarely and unmistakably on the party who denies registration or its validity. In the present case, the appellants' definite plea in the written statement was that Natharsa Rowther died within 15 days of the execution of the document. This was not made out at the trial by any evidence. I have, therefore, no hesitation in rejecting the contention that the registration of the trust deed was obtained by Natharsa Rowther's agent after his death.

7. Mr. Kothandaraman then hazarded an argument that the suit was barred by limitation. This argument, in my view, cannot be mouthed at all in this case, considering that the whole basis of the suit was to recover the trust properties which had been alienated by a former trustee in breach of trust. No question of limitation at all can arise in such a suit.

8. Lastly it was contended that the appellant ought to have been paid compensation for a structure raised by him in the suit property. This contention has been adequately dealt with by both the Courts below and rejected as unsound. They relied on a catena of decisions which hold that an alienee of property conveyed by a trustee in breach of trust would not be entitled to compensation for any improvements made by him on the property. The legal position is to well-settled for citation of case-law. This contention must accordingly be rejected.

9. In the other second appeal, *i.e.*, S.A. No. 1464 of 1976 filed by another alienee of trust properties, an additional argument was urged. I was minded to regard this plea as having been addressed more for the consumption of the present trustee of the plaintiff-trust, than for serious examination by this Court. Learned counsel pointed out that the particular transfer under which his client had obtained 7 cents of trust property from the previous trustee was a deed of exchange in which his client had parted with a larger extent, namely, 11 cents, not to speak of some cash consideration also in favour of the trust. The suggestion is that this alienation by way of exchange was in no way detrimental to the trust, but must have actually benefited it. I must reject this argument as wholly untenable. There is no evidence that a larger extent of property brought an added benefit to the trust. Besides, I must reject the very approach behind this argument. The idea seems to be that if a trust benefits by a breach of trust committed by a trustee, then a Court must accept the benefit and reject the breach. This, in my opinion, is too dangerous a doctrine of pragmatism to be countenanced in the law of trusts. To say that a trust may benefit by a breach of trust may be utilitarian, but a breach of trust is a breach of trust for all that. It would be subversive of the fundamental basis on which this jurisprudence rests for a Court to turn the Nelson eye to a breach of trust, if with the other eye it can find that the trust is not the worse off in consequence. On the contrary, the proper way the law deals with a breach of trust is to regard it as an evil in itself. I do not propose to depart from this rule in this case.

10. Both the second appeals are accordingly dismissed with costs.

S.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Kumudavalli Ammal *alias* **Kuppammal and another** .. *Appellants**

v.

P. N. Purushotham .. *Respondent.*

Civil Procedure Code (V of 1908), section 92—Scope and applicability — Infringement of private rights outside scope of enquiry under the section—Public trust for running and maintaining a Higher Elementary School—Allegations of mis-management against the trustee—Advocate-General's sanction obtained by plaintiffs—One of the plaintiffs, widow of a relation of the founder and the other an old boy of the school and resident of the locality—Action against trustee maintainable.

Section 92 of the Code of Civil Procedure which operates as a shield against the mis-management of a public trust whether charitable, religious or otherwise is as far as possible, exhaustive so as to afford protection for the due and proper maintenance and upkeep and processing of public trusts and to guard

* O.S.A. No. 61 of 1974. 16*th August*, 1977.

as against mis-management, mis-appropriation and wild indulgence on the part of those who are for the time being enjoined to administer such trusts. The infringement of private rights is undoubtedly outside the scope of enquiry under the section. As long as it is apparent from the pleadings and from the evidence let in a particular action that the suit was not for vindication of personal or individual rights, but the suit was brought in a representative capacity for the advancement of the objects of the trust, there can be no possible bar to the maintainability of such a suit. It should be established that the persons, who are complaining against the administrators of the trust have a real interest *in presenti* and not a mere sentimental interest. The purposeful use of the expression "two or more persons having direct interest in the trust" was intended to widen the class of persons entitled to institute the suit under the section. Here again the interest should be real, substantive and an existing interest and not a mere remote, fictitious or contingent one. It would therefore appear from the meaningful expansion of the word 'interest' in section 92, Civil Procedure Code, that a person in order to lay a suit under it should plead and establish that he has some tangible interest towards the maintenance and progress of the public trust. Such an interest could be established in a number of ways. A resident of the locality who has some nexus or connection with the trust in the sense that he has interest in its well-being and prosperity, can, under certain circumstances be taken to be a person having an interest in the trust. In the case of a temple, a fair presumption of the existence of such a right in a person can be raised in the case of a resident in the locality who visits the temple and who takes part in normal rituals and religious functions. In the case of a public school, such presumption could also be raised if he is an old student of the school, which necessarily involves a connection with it and if he is also a resident of the locality in which the school is situate he is doubly justified to lay an action along with another under section 92, Civil Procedure Code. What is to be primarily established is (1) that the suit relates to a trust created for a public purpose; (2) it should contain allegations against the person-in-breach, such as breach of trust, misappropriation or mis-management and; (3) the necessity in the particular circumstance of a given case for administration of the trust by a body other than the body in management. If two or more persons having an interest in the trust file such a suit, then it is maintainable. [*Para.* 5.]

Appeal under clause 15 of the Letters Patent and Order 36, Rule 1 of the Original Side Rules against the Judgment and decree of the Hon'ble Mr. Justice Paul dated 25th March, 1974 and made in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C.S. No. 73 of 1972.

K. Sarvabhauman and *K. S. Narayanan*, for Appellants.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The plaintiffs in a suit filed under section 92 of the Code of Civil Procedure, in C.S. No. 73 of 1972 on the file of the Original Side of this Court, are the appellants. After obtaining the sanction from the Advocate-General, Madras, the plaintiffs have filed the present suit to remove the defendant from trusteeship, for appointing a fit and proper person as trustee of a public trust endowed for the purpose of running and maintaining what is known as Nagammal Hindu Higher Elementary School, which was dedicated by late Nathamuni Chetti under a deed of trust dated 2nd June, 1941. For the said purpose certain immovable properties were also earmarked by the author of the trust. The plaintiffs complained of mis-management by the respondent, who is now functioning as trustee. They would claim to be interested in the trust, the first plaintiff being the widow of late Nathamuni Chetty and the second plaintiff being a close relation and old boy of the Elementary School besides being a resident of the locality. They catalogued several events in the plaint according to which their main complaint is that

the defendant failed to maintain the school as per the directions of the trust and the author of the trust and has also caused wanton and continuous breach of the express terms thereof. They would also demand an account from the defendant from 1969 till date and sought for ancillary reliefs. The defendant in the written statement questions the status of the second plaintiff as a plaintiff in a suit under section 92 of the Code of Civil Procedure, as he is not a descendant of the founder and as he cannot be said to have any real or substantial interest in the trust. He would, therefore, allege that the suit is not properly framed and therefore, not maintainable, as the primary requirement under section 92, Civil Procedure Code, is that there should be two or more persons interested in the trust, who could seek for any reliefs set out in the section. Besides challenging the sanction given by the Advocate-General, the defendant would complain that the plaintiffs objective is to enrich themselves and not to further the objects of the trust. He would deny that he has committed any acts of waste and would plead that if any other trustee is appointed to manage the trust in the place of the defendant it would amount to a violation of the founder's express desire and considered intention.

2. Paul, J., who tried the suit, framed the following issues:

1. Whether the suit is not maintainable for any reason?

2. Whether valid sanction has been obtained from the Advocate-General under section 92, Civil Procedure Code?

3. Whether the trust is being mismanaged by the defendant?

4. Whether the grant is suspended on account of mis-management on the part of the defendant?

5. Whether any breach of the wish of the founder of the trust was caused by the defendant?

6. Whether the first plaintiff is entitled to file this suit?

7. To what relief is the plaintiff entitled?

3. On the first issue, the learned Judge found that the suit was not maintainable since in the related circumstances the second plaintiff cannot be said to have the requisite interest to file and prosecute the action. He held that the plaintiffs obtained due sanction from the Advocate-General and are entitled to file the suit. On issues 3, 4 and 5 which covered the main points of controversy between the plaintiffs and the defendant, the learned Judge after an elaborate discussion into the oral and documentary evidence held that the main item of trust, namely, the Nagammal Hindu Higher Elementary School is being mis-managed by the defendant and that the grant by the Government was suspended on account of such mis-management and that the defendant acted against the wishes of the founder. In the end however, the learned Judge observed as follows:—

> "In view of my findings on issues Nos. 2 to 5, the plaintiffs would have been entitled to all the reliefs which they have claimed in the plaint, but in view of my finding, on issue No. 1 that the suit is not maintainable since the second plaintiff does not have the requisite interest, this suit has to be dismissed and the plaintiffs will not be entitled to the reliefs claimed in this suit. Hence this suit is dismissed, but, in the circumstances of the case, I direct each party to bear their own costs".

The plaintiffs have come up in appeal.

4. The respondent is not represented before us. It, therefore, became necessary for us to consider the question in some detail. We may at once state that as the respondent is not before us and has not cared to challenge in any manner the findings of the learned Judge on issues 3, 4 and 5, which is to the effect that the defendant did commit acts of waste and mis-managed the trust and acted against the wishes of the founder, it is not necessary for us to retread the ground. We however perused the judgment and we have no reason at all to differ from the findings on these issues

of the learned Judge. We, therefore, confirm the same.

5. The only substantial question which arises for consideration in this appeal is whether the suit as framed is maintainable. Section 92 of the Code of Civil Procedure, which operates as a shield against the mis-management of public trust whether charitable, religious or otherwise is, as far as possible exhaustive so as to afford protection for the due and proper maintenance, upkeep and processing of public trusts and to guard as against mismanagement, misappropriation and wild indulgence on the part of those who are for the time being enjoined to administer such trusts. The infringement of private rights is undoubtedly outside the scope of enquiry under the section. As long as it is apparent from the pleadings and from the evidence let in a particular action that the suit was not for vindication of personal or individual rights, but the suit was brought in a representative capacity for the advancement of the objects of the trust, then there can be no possible bar to the maintainability of such a suit. It should be established that the persons, who are complaining against the adminstrators of the trust have a real interest *in presenti* and not a mere sentimental interest. The purposeful use of the expression two or more persons having a *direct interest* in the trust was intended to widen the class of persons entitled to institute the suit under the section. Here again, the interest should be real, substantive and an existing interest and not a mere remote, fictitious or contingent one. It would, therefore, appear from the meaningful expansion of the word 'interest' in section 92, Civil Procedure Code, that a person in order to lay a suit under it should plead and establish that he has some tangible interest towards the maintenance and progress of the public trust. Such an interest could be established in a number of ways. A resident of the locality who has some nexus or connection with the trust in the sense that he has interest in its well-being and prosperity, can, under certain circumstances be taken to be a person having an interest in the trust. In the case of a temple a fair presumption of the existence of such a right in a person can be raised in the case of a resident in the locality, who visits the temple and who takes part in normal rituals and religious functions. In the case of a public school such presumption could also be raised if he is an old student of the school, which necessarily involves a connection with it and if he is also a resident of the locality in which the school is situate he is doubly qualified to lay an action along with another under section 92, Civil Procedure Code. What is to be primarily established is that the suit relates to a trust created for a public purpose; (2) it should contain allegations against the person-in-breach, such as breach of trust, misappropriation or mismanagement; and (3) the necessity in the particular circumstance of a given case for administration of the trust by a body other than the body in management. If two or more persons having an interest in the trust file such a suit, then it is maintainable. The question in the instant case before us is whether the second plaintiff has such an interest.

6. It is, therefore, necessary for us to deal with the evidence let in this case before we consider further the legal requirement and its aspects. One argument which was addressed before us was that the second plaintiff is the son of the founder's wife's sister. Such a relationship cannot be said to be a substantial compliance of the primordial requirement under section 92, Civil Procedure Code, for the maintainability of a suit under it. A remote relationship through the female line by itself, cannot, as rightly pointed out by the learned Judge, be such an interest which is sufficient for him to lay an action along with the 1st plaintiff against the defendant, particularly under the special procedure prescribed under section 92, Civil Procedure Code.

7. Nextly, can the second plaintiff be said to be interested in the trust because he is a member of the public and a resident of the locality? We have already hinted at the weightage to be given to this aspect. No doubt mere residence and the badge of being a member of the

public of the locality may, not by itself be sufficient to hold that the second plaintiff has sufficient interest within the meaning of section 92, Civil Procedure Code. The school in question as founded by late P. V. Nathamuni Chetti is admittedly a public school in the sense that all members to whichever community they belonged are admitted. In the peculiar case under consideration which relates to the creation of trust for the running of a school several peculiar features enter into the discussion. A resident of the locality in which the school is situate and in which the trust is functioning may not have a direct nexus with the management of the institution, but is undoubtedly interested in keeping the school truthful, upright and well-managed. After all a school is established by a donor so as to propagate education amongst the children in the locality and any parent therefore, living nearby would obviously be interested in raising an expectation within himself that the school is a fit and proper institution in which his children could study. If it is a case of a temple or choultry evidence may be necessary to show that a resident visits the choultry or the temple or that the choultry was put up therein for the benefit of the community to which the donor belongs. But in the case of a school such an objective test is not possible. If a fair inference could be drawn that a resident in the locality is subjectively interested in the well-being of the school and, therefore, the trust, since his object is that his descendants as also the children of the parents in the locality should conveniently get their education in the nearby school, then such an interest would in our view come within the meaning of the expression "having an interest" and cannot be held to be illusory or hypothetical. Indeed the line of cases cited before the learned Judge all related to either a temple or a choultry and the ratio in such decisions was that in order to uphold an interest in such trusts, it should be a present and a substantial one and not a remote and a fictitious one. The learned Judges in the cases cited before Paul, J., were concerned with either a temple or a mosque or a choultry. In all such cases it was held that the visitations to a temple and resort to a choultry or frequent visists to a mosque could only create such a present and substantial interest, but can that theory automatically be extended to a school which is the fountain of education to which children are sent by the people in the locality to get their children educated? Excepting for their subjective satisfaction that the school is run well and on sound grounds by persons who are fit and proper to administer the same, they cannot be said to have any more interest in the well-being of the school. Nevertheless such an interest cannot be said to be a fictitious or an illusory one. In our view it has a present and a meaningful interest also in the trust because the residents are interested in the well being of the school and its proper regulation. It is not necessary that a particular person to have an interest under section 92, Civil Procedure Code, should be personally interested or personally affected by any act done by the administrator of the trust. If it could be established that they are interested in the proper conduct and running of the trust and are involuntarily involved in evincing interest in its being regulated and conducted in accordance with the terms of the trust, it would reasonably be said that such a person has enough of an interest in the trust concerned.

8. In the instant case it is not in dispute that the second plaintiff is a resident of the locality and is thus a member of the public. The claim of the second plaintiff is that he has studied during 1947-48 in this school. This is corroborated by P.W. 7 the first plaintiff. The defendant did not produce any records of the school of the year 1947-48 to disprove that the plaintiff was not an old student of the Nagammal Hindu Higher Elementary School of which he is the trustee. P.W. 1's evidence is that the second plaintiff's parents were living outside Madras and that even during the lifetime of her

husband the second plaintiff was brought up by her and was educated in the early days in Nagammal's school. Paul, J., was of the view that since the second plaintiff did not summon the production of the transfer certificate issued to him by the Nagammal Hindu Higher Elementary School, his case should not be believed. But on the other hand by making a specific and a serious allegation which touches the core of the suit in so far as its maintainability is concerned, the onus shifted to the defendant to disprove such an allegation. We have no special ground to disbelieve the plaintiffs that the second plaintiff was an old student of the school. The point made out was that no such allegation was made in the plaint. In the plaint no doubt, the second plaintiff pleaded that he was entitled to file the action and he was a member of the public and interested in the growth, welfare and good management of the trust. The fact whether he was an old boy of the school is only a matter of evidence and need not be a matter of pleading. Hhe swore to this aspect in the witness box and was supported by the first plaintiff as P.W. 7. We have already made it clear that in the case of a temple, visitations to it on important occasions, like marriage festivals or other religious functions in the temple itself might be a substitute of evidence to show that a resident within two or three miles of the temple site might be said to have an interest in the temple. But in our view when it is established that the second plaintiff was a resident of the locality and was also a member of the family of the first plaintiff and her husband, though in the female line and claims to have studied in the school during the particular period for which there is no contrary evidence, it cannot be said that the second plaintiff has no interest at all in the well-being and upright management of an educational institution which, as we reiterated already, is intended to benefit everyone in the locality in the sense that it has been created for the purpose of bringing into its fold the children who are the children of the residents in the surrounding locality and train them as citizens of our country.

9. We agree with the learned Judge that plaintiffs are not actuated by any personal interest or personal motives in filing this action. But we are unable with respect to share his view that the second plaintiff cannot be said to be a person having an interest in the trust.

10. For the foregoing reasons we are of the view that the second plaintiff, in the circumstances of the case and having regard to the fact that the subject-matter of the trust is a public school it should be held that he is a person having a substantial interest in the well-being of the institution and that the second plaintiff along with the first plaintiff do comply literally with the mandates regarding the number of persons to institute the action under section 92, Civil Procedure Code. We are aside the finding under issue No. 1 and hold that the suit has been properly filed.

11. We have already held that the learned Judge in all other respects condemned the action of the defendant and in fact expressed the view that but for his finding on issue No. 1, that the suit is not maintainable, the plaintiffs should be entitled to all the reliefs which they have claimed in the plaint. As according to us the suit is maintainable, and as there is no challenge on the findings rendered by the learned Judge on issues 2 to 5 the suit has to be decreed as prayed for and the defendant is directed to render a true and proper account of the income derived in the management of the school from 1969 till date. The subject-matter however is remitted back to the learned Judge sitting on the Original Side for him to frame a suitable scheme for the administration of the trust and after the scheme is so framed, direct the defendant to deliver the suit properties to the new trustees to be appointed under the scheme and pass such further orders as are necessary for the vesting of the properties in the trustees to be constituted under the scheme.

12. The appeal is allowed, but there will be no order as to costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and C. J. R. Paul, JJ.*

The Revenue Divisional Officer, Chidambaram ... *Appellant**

v.

A. N. Damodara Mudaliar M. L. G., Managing Trustee of Pataleeswarar Devasthanam, Tirupapuliyur and another ... *Respondents.*

Land Acquisition Act (I of 1894), section 9—Notices under section 9 (2)—Date of notice cannot be the date of service of notice without proof—Date of service of notice relevant for reckoning the period of 15 days available for preferring objections — Compensation — Lands described as agricultural lands in public records—Lands situate in developed neighbourhood—Valuation to be based on potential value as building site.

The lands which were the subject-matter of acquisition were described as agricultural lands in the public records and the Land Acquisition Officer awarded compensation on that basis. But the lands were in a developed neighbourhood and were capable of being converted into building sites. On a reference under section 18 of the Land Acquisition Act, the civil Court fixed the compensation at Rs. 6,000 per acre as against Rs. 820 per acre awarded by the Land Aquisition Officer. The Government filed an appeal against the enhanced compensation and also raised the legal contention that the claimants did not prefer their objections within the time prescribed under the Act.

Held: Natural justice required that any notice to be effective and to be positive should have been served on the person against whom it was intended and, without proof of actual service of such notice a bare inference of constructive knowledge of the obligation to prefer the claim within 15 days from the date of the notice, ought not to be pressed into service to the prejudice of the affected party. Reading sections 9 (2) and 9 (3) together, the intendment of the prescription and mandate in sub-section (2) of section 9 of the Act was to see that the notice under section 9 (2) as in section 9 (3) should also be served on the persons affected and that ought to be the date which had to be reckoned for purpose of calculating the 15 days' time available to the claimant for preferring his objections under the above sub-section. This prescription in section 9 (2) of the Act read in conjunction with the well-known principles of natural justice required that it was the date of the service of the statutory notice in any enactment which ought to be the relevant factor to consider whether the subsequent conduct of the addressee was in accordance with the statute or not. [*Para.* 4.]

In the case under review, there was certain potential in the land and such potential being referable to its certain future improvement as a building site, it could not be treated as agricultural land. The contention of the appellant that the lands had still to be valued only as agricultural lands could not be accepted. The Court below had rightly treated the lands as potential house sites and valued the same. [*Para.* 7.]

Cases referred to:—

Venkatarama Iyer v. *The Collector of Tanjore*, (1931) 60 M. L. J. 410: I.L.R. 53 Mad. 921: 32 L. W. 363: A.I.R. 1930 Mad. 836; *State of Madras* v. *Srinivasa Iyengar,* (1970) 2 M.L.J. 628; *V. C. Dev* v. *Special Land Acquisition Officer*, A.I.R. 1960 Bom. 232; *Egappa Gounder* v. *Special Tahsildar, Madras,* (1970) 83 L. W. 561; *State of Madras* v. *V. Ramaswami,* (1970) 83 L.W. 621.

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore dated 24th January, 1972 and passed in O.P. Nos. 42 and 43 of 1968.

The Additional Government Pleader, for Appellant.

* App. Nos. 367 and 603 of 1973 and Memorandum of Cross-Objections in App. No. 603 of 1973. *10th October,* 1977.

P. S. Ramachandran, K. Ramachandran and *N. S. Varadachari,* for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—These two appeals are against the judgment of the learned Subordinate Judge of Cuddalore in O. P. Nos. 42 of 1968 and 43 of 1968 on his file. A.S. No. 361 of 1973 is by the State Government against the decision of the Court below in O.P. No. 42 of 1968. A.S. No. 603 of 1973 is against such a decision in O.P. No. 43 of 1968. The lands in O.P. No. 42 of 1968 are owned by a temple called Pataleeswarar Devasthanam. The lands which are the subject-matter of O.P. No. 43 of 1968 are owned by a private party. The Land Acquisition Officer, after the promulgation of the notice under section 4 (1) of the Land Acquisition Act on 27th December, 1961, issued notices to the claimants as above which are marked as Exhibits B-2 and B-5. Both the notices are dated 24th April, 1965. There is some controversy on the question as to whether the date of the notice should be taken as the date of service of such notice on the claimants. The case of the State is that the date of the notice should be taken as the date of service of such notice on the claimants. The case of the State is that the date of the notice should primarily be taken into consideration, for all purposes, whilst the case of the claimants is that the date of service of such notice governs all relevant considerations. We shall advert to it at the appropriate time. In O.P. No. 42 of 1968, lands belonging to the Devasthanam and situate in T. S. Nos. 258, 267 and 268 were acquired. The extent of the land acquired in T.S. No. 258 is 3.02 acres with a well thereon. In T.S. No. 267, an extent of 3.61 acres with a well and in T. S. No. 268, an extent of 4.24 acres with a shed are acquired. In O. P. No. 43 of 1968, 51 cents in T.S. No. 264, 2.82 acres with an Engine shed and a hut and a bore-well therein in T. S. No. 265, and 21 cents in T.S. No. 266 were acquired for the public purpose of providing house sites for low income group Government servants. The claimants were not satisfied with the award of Rs. 820 per acre, granted by the Land Acquisition Officer who classified the lands as agricultural dry lands and they sought for a reference under section 18 of the Land Acquisition Act to the civil Court. The learned Subordinate Judge of Cuddalore based his estimate of the market value of the lands on the situation of the lands and their potential value and after taking into consideration such other relevant factors for assessment, valued the lands at Rs. 6,000 per acre. The State is dissatisfied with such assessment made by the civil Court and hence the two appeals.

2. The first contention of the learned Government Advocate, appearing for the appellant, is that there has been a proper service of notice which is required under section 9 of the Land Acquisition Act and such a notice having been properly served on the claimants, the fact that they did not prefer claims for compensation in due form with the necessary particulars within the time prescribed, before the Land Acquisition Officer, is fatal to a grant of any sum over and above that granted by the Land Acquisition Officer. Secondly, it is said that the classification made by the Land Acquisition Officer that the lands acquired for the public purpose are agricultural lands, is correct and an interference by the civil Court regarding the same is not warranted on the facts and circumstances. Thirdly, it is said that the value fixed by the Court below is rather on the high side. We shall take up the first contention.

3. Exhibits B-2 and B-5 are admittedly the notices issued by the Land Acquisition Officer under section 9 (2) of the Act. It is not in dispute that the public notice contemplated under section 9 (*i*) has been published. What is, however, said is that the date as it appears in Exhibits B-2 and B-5 as the date of issuance of the notice under section 9 (2) of the Act shall be deemed to be the date on which the claimants should have been served or in any event deemed to have been put on specific notice of the fact that the Collector expects a reply

in the shape of a statement to be made in writing and signed by the claimant or his agent within 15 days after the date of such notice stating the interests of the claimant in the land and particulars of claim to compensation for such interests and other objections. Probably the provocation to put an accent on the date of the notice as the relevant circumstance for consideration under section 9 (2) of the Act is given by the different language used by the Legislature in section 9 (3) of the Act. In section 9 (3), it is said that the Collector shall also serve the notice to the same effect on the occupier of such land......... The word "serve" does not appear in section 9 (2) of the Act. But it merely contemplates that such notice shall state the particulars of the land and should require persons interested to appear personally before the Collector at a time and place mentioned therein, such time not being earlier than 15 days after the date of the notice and state their objections.

4. Natural justice requires that any notice to be effective and to be positive, should have been served on the person against whom it is intended and without proof of such actual service of such notice a bare inference of constructive knowledge of the obligation to prefer the claim within 15 days from the date of the notice, ought not to be pressed into service to the prejudice of the aforesaid party. Reading sections 9 (2) and 9 (3) together, we are of the view that the intendment of the prescription and mandate in sub-section (2) of section 9 of the Act is to see that the notice under section 9 (2) as in section 9 (3) should also be served on the persons affected and that ought to be the date which has to be reckoned for purpose of calculating the 15 days' time available to the claimant for preferring his objections under the above sub-sections. There is ample authority for the proposition that any deviation from the mandate as appearing in section 9 (2) of the Act in the matter of the grant of interval of 15 days to the affected party to submit his objections, has been held to be a contravention of the mandate in the statute. In *N. M. Venkatarama Iyer* v. *The Collector of Tanjore*[1], it was held that the personal notice under section 9 (3) of the Act should afford the occupier of the land the same interval of 15 days for stating the particulars of his claim for compensation as is provided for in the case of a public notice under sub-section (2) of section 9. In that case of course the Court was concerned with the notice under sub-section (3) of section 9. The principle appears to us to be the same and this prescription in section 9 (2) of the Act read in conjunction with the well-known principles of natural justice, requires that it is the date of service of a statutory notice in any enactment which ought to be the relevant factor to consider whether the subsequent conduct of the addressee is in accordance with the statute or not. In the instant case, R. W. 2, examined on behalf of the Referring Officer, admits that Exhibits B-2 and B-5 were served only a week prior to the date of the hearing. Undoubtedly such service contravenes the main intention of the salutary provision in section 9 (2) of the Act. There is also evidence on the side of the claimants in A.S. No. 367 of 1973. The Executive Officer of the Devasthanam maintains a diary. He produced Exhibit A-17, a certified copy of an extract from the diary kept by him during the relevant period. That shows that the temple was only served on 19th March, 1965. Here again, it falls short of the 15 days' time for appearance prescribed in section 9 (2) of the Act. Thus this is a case where the date of the notices Exhibits B-2 and B-5 alone cannot govern the situation. But it is the date of service of such notices which is the essential *criteria* to consider whether the claimants have acted in accordance with the statute or not. Obviously, the learned Government Advocate would stress upon this as this factor is linked with another provision in the Land Acquisition Act, namely, section 25 of the Act. Sub-sections (2) and (3) of section 25 of the Act contemplate two different situations. Under sub-section (2) of section 25 of the Act, the applicant should have refused

1. (1931) 60 M.L.J. 410: I.L.R. 53 Mad. 921: 32 L.W. 363: A.I.R. 1930 Mad. 836.

to make a claim or omitted, without sufficient reason, to make such a claim'. In both the above cases, the amount awarded by the Court shall in no case, exceed the amount awarded by the Collector. What is contemplated in sub-section (3) of section 23 of the Act is that if the claimant has omitted for a sufficient reason (to be allowed by the Judge) to make such a claim, then the amount awarded to him shall not be less, but may exceed the amount awarded by the Collector. The objection therefore of the State is that as the claimants did not prefer their claims in time and as there was no sufficient reason for their omission to do so, they ought not to be awarded any amount in excess of the amount awarded by the Land Acquisition Officer. We are unable to agree. On merits, we have already come to the conclusion that the 15 days' time provided for under section 9 (2) of the Act was not given to the claimants in both the appeals and that by itself is a sufficient reason for the learned Subordinate Judge to act under sub-section (3) of section 25 of the Act and award an amount in excess of that awarded by the Collector. This question also was considered by our Court is *State of Madras* v. *Srinivasa Iyengar*[1]. The Court held that if there was a deliberate refusal on the part of the claimant to make a claim and if the omission to make it was without sufficient reason, then the Court would be justified in not awarding a compensation in excess of that awarded by the Land Acquisition Officer. But if there are circumstances to show that the omission was for a sufficient reason, then sub-section (3) of section 25 of the Act would come into play.

5. The merits of this case disclosed that the claimant in O. P. No. 43 of 1968, who was only served with a notice a week before the hearing, filed a partition deed Exhibit B-3 (petition to E. D. C. Chidambaram) as also a medical certificate Exhibit B-4 to show that he could not file his statement of objections in time. The Land Acquisition Officer ignored such objections, but passed the award on the date of hearing fixed by him. The explanation given by the Executive Officer that he took some time to get instructions from the higher hierarchy cannot be lightly brushed aside as one without substance or without reason. Therefore the Court below was right when it upheld the claimants' contention that the omission to file their claims and their objections on or before the date fixed for hearing by the Land Acquisition Officer under section 9 of the Act, was with sufficient cause and that the omission was neither deliberate nor wanton. We therefore agree with the claimants—respondents that this not a case in which section 25 (2) of the Land Acquisition Act can be invoked and the claimants be refused a compensation higher than that awarded by the Land Acquisition Officer.

6. The third argument of the appellant is that the market value fixed by the civil Court is rather on the high side. We have already made it clear that the classification of the lands as agricultural lands, by the Land Acquisition Officer is not at all justified. No doubt the mere fact that the lands are situate in a Municipality or in a town cannot by itself be urged as the one and sole factor to decide that though in public records the lands are described as agricultural lands, they ought to be treated as house sites or lands fit for house sites. The decision relied upon by the learned Government Pleader in *V. C. Dev* v. *Special Land Acquisition Officer*[1], is not apposite as would be seen hereafter. There the Division Bench of the Bombay High Court said, that every piece of land within the municipal area acquired by the Government may not be assumed to have an immediate building potentiality. The circumstances that some temporary hutments had, during the period of requisition of the agricultural land by the Government, included in the municipal area had been constructed on the land would not attribute to the land a building potentiality at the date of the acquisition.

7. What is the reasonable classification to which the acquired lands can be pigeonholed in this case? The lands are surrounded on the West, South and East by public streets and on the North by

1. (1970) 2 M.L.J. 628.

1. A.I.R. 1960 Bom. 232.

a Railway Station. Very near to these lands are colonies which had already developed and the proximity of such residential locality to the acquired lands, gives a different stature and classification altogether and a mere reliance on the public records for purposes of appreciating the use to which the lands can be put to, ought not to be always encouraged. The evidence in this case, also is a pointer to the potential use to which those acquired lands can be put to. P.Ws. 1 and 2 speak of such an inhered potential in the lands. They were not cross-examined and nothing against such a reasonable assumption was brought out. That such potential inhered in the land should also provide a guide for evaluation is more or less accepted by this Court. Vide *Egappa Gounder* v. *Special Tahsildar, Madras*[1], and *State of Madras* v. *Ramaswami*[2]. In one of the cases to which one of us was a party, we made it clear that the condition of the land together with its existing advantages, immediate possibilities and prospective capabilities enter into the mechanics of computation. The impact of a developed neighbourhood or the prospect of it in and around the sector of acquisition turns such potential of the land to account as well. But certain limitations to the adoption of the above principle were also pointed out. The Court said that such future utility which an owner of land can take advantage of, ought not to be conjectural, but should reasonably be based on normal business principles. In the Bombay case cited, there was only a chance of the properties developing. But in contradistinction to the observation of the learned Judges of the Bombay High Court, in the case under review, there is certain potential in the land and such potential being referable to its certain future improvement as a building site, it cannot be treated as agricultural lands. We are therefore unable to agree with the third contention of the learned counsel for the appellant that the lands have to be still valued only as agricultural lands. The Court below has rightly treated the lands as potential house sites and valued the same.

1. (1970) 83 L.W. 561.
2. (1970) 83 L.W. 621.

8. As regards the price reliance was placed upon Exhibits A-2 to A-4 by the civil Court. The important data is provided under Exhibit A-2, which is dated 5th September, 1962. This of course is a post notification sale. But in the absence of any other sale in the vicinity of a building site, the Court had to refer to Exhibits A-2, A-3 and A-4, which sales took place in the years 1962 and 1964 for purposes of a fair evaluation of the just compensation payable to the land. The witness examined for the Referring Officer, R.W. 2, in his evidence stated that the lands sold in S.No. 365 are in no way different from the lands acquired. The lands sold in S. No. 365 are lands which were the subject-matter of the sale in Exhibit A-2. It cannot be said that Exhibits A-3 and A-4 relate to sales which are dissimilar to the lands comprised in the sale deed Exhibit A-2. Having regard to the fact that P.Ws. 1 and 2 were not even cross-examined on their testimony as to the fitness of the acquired lands as building sites and the adoptability of the value in Exhibit A-2, we are unable to say that the value fixed by the Court below at Rs. 6,000 per acre on the date of the notification under section 4 (*i*) of the Act is in any way unreasonable.

9. The last point urged before us is that the cross-objections in A.S. No. 603 of 1973 are without merits. Learned counsel for the cross-objector in A.S. No. 603 of 1973 would say that he is entitled to severance compensation. According to him, the well in the land acquired, having been compulsorily taken away and severed from the neighbouring lands which the well was watering and irrigating, he has suffered thereby and therefore he would be entitled to severance compensation. We are unable to agree that this head of compensation provided for in section 23 of the Act, would ever take in any such claim at all. "Severance compensation" as the term itself indicates, is compensation awardable to the affected person because of the severance of the land into different parcels by reason of the compulsory acquisition. What is said is that because the well in the land has also been acquired

and for which compensation has also been paid, the surrounding lands of his have suffered damage. Learned counsel for the cross-objector did not point out to us any specific provisions under which such a grant can be made and we are unable to find one ourselves under which this claim can be sustained. There is fallacy equally in this argument because the compensation has been granted to the claimants not as an agricultural land, but as a house site. When we queried Mr. N. S. Varadachary, whether he could still insist on his case for severance compensation, and whether the cross-objector would be willing to take compensation for the land on the basis that it is agricultural land, he expressed his difficulty. On that ground also, this claim for severance is not sustainable. The appeals fail and even so the memorandum of cross-objections. They are dismissed. There will be no order as to costs.

S.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*P. Govindan Nair, CJ. and A. Varadarajan, J.*

K. S. Somasundaram and others .. *Petitioners**

v.

The Secretary, Railway Board, Rail Bhawan, New Delhi and others .. *Respondents.*

Railway Services — Determination of seniority — Grain Shop Department — Employees of—Department wound up—Employees absorbed as brakesmen in permanent department—Circular, dated 16th October, 1952 *of Railway Board fixing seniority—Petitioners who had lien in B grade promoted as A grade Guards—Decision of Supreme Court in* General Manager, South Central Railway *v.* T. Venkata Rao, *A.I.R.* 1976 *S.C.* 678*—Petitioners reverted as B Grade Guards—Order of reversion held bad—Petitioners restored to A grade—Constitution of India* (1950), *Article* 226.

The petitioners were originally employed in the Grain Shop Department of the Southern Railway. The Grain Shop Department was wound up in 1949 and the petitioners were absorbed as brakesmen in the permanent department. The principle for fixation of salary as well as for the determination of seniority was laid down by a circular of the Railway Board, dated 16th October, 1952. The petitioners had their seniority fixed by taking into account their services in the Grain Shop Department which resulted in their being promoted as 'A' Grade Guards.

In the case of certain class III persons as they were called, the Railway Board decided not to allow them, the service they had in the Grain Shop Department for fixing their seniority in the permanent absorbing Department. Those persons approached the Andhra Pradesh High Court under Article 226 of the the Constitution which held that those persons could not be denied the services they had in the Grain Shop Department. This was subsequently confirmed by the Supreme Court. The Supreme Court had to deal with some persons who were absorbed as clerks in the permanent absorbing department and voluntered to be appointed as Assistant Station Masters. The passage in the decision of the Supreme Court in *The General Manager, South Central Railway* v. *T. Venkata Rao,* (1975) 4 S.C.C. 619: A.I.R. 1976 S.C. 678, dealing with the question of seniority of these persons contained in paragraph 5 thereof was misunderstood by the Railway Board who passed the order, dated 14th July, 1976 reverting the petitioners herein from *A* Grade Guards to *B* Grade Guards. The petitioners challenged the validity of this order.

Held: The decision of the Supreme Court should be understood in the light of the specific contentions which had been raised before the Court. That case did not deal with the initial absorption in accordance with the principle laid down by the Railway Board itself by circular, dated 16th October, 1952. The judgment dealt with a case where the persons so absorbed initially voluntarily left the post of clerks and discarded their normal avenues of promo-

* W.P. Nos. 4163 to 4167 of 1976.
2nd August, 1977.

tion and chose to opt for what were called ex-cadre posts as Assistant Station Masters. The Supreme Court could not be understood as having laid down that in the initial absorption, if the employer due to exigencies of the situations and in the exercise of managerial functions decided that the absorption should not be only to clerical cadre but should be in such posts where the absorbed persons could be more conveniently and, particularly, more usefully employed, all the persons absorbed could not be treated similarly, one section having the benefit of the services rendered by them in the Grain Shop Department and another section not getting that benefit. That would be clearly discriminatory, as such procedure would amount to denying to some what had been given to others. But in fact the Railways did not so discriminate. They gave the brakesmen—the petitioners, the benefit of their services they had in the Grain Shop Department as early as 1949 and they remained as guards till the decision of the Supreme Court was rendered in the case referred to above. The Railway Board had misunderstood the dicta in passing the order, dated 14th July, 1976 and the consequential further orders reverting the five petitioners from Guards Grade A to Guards Grade B. There was no justification for this. The decision of the Supreme Court cited above did not support such a procedure. The order of the Railway Board, dated 14th July, 1976, was therefore liable to to be set aside as well as the consequential orders by which the petitioners had been reverted to the post of Guards Grade B from the post of Guards Grade A and directions issued that the posts held by the five petitioners before the order of the Railway Board dated 14th July, 1976 be restored to them with consequential benefits and their services continued in the cadre of Guards Grade A.

[*Para.* 6.]

Cases referred to:—

The General Manager, South Central Railway v. *K. Venkata Rao*, (1975) 4 S.C.C. 619: A.I.R. 1976 S.C. 678; *The General Manager, South Central Railway* v. *A. V. R. Siddhanti*, (1974) 3 S.C.R. 207: (1974) 4 S.C.C. 335: A.I.R. 1974 S.C. 1755.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue writs of *mandamus* directing the respondents, to forbear from giving effect to or enforcing or implementing the order of the Railway Board the 1st respondent herein as contained in the communication of the 1st respondent No. E(NG)11-74 RE1|2 dated 14th July, 1976 addressed to the General Managers of all Indian Railways relating to seniority of Ex-Grain Shop Departmental staff on absorption in other departments in so far as it relates to the petitioner in each of the petitions respectively.

V. R. Venkataraman, for Petitioners.

K. Venkateswara Rao, for Respondents.

The Judgment of the Court was delivered by

Govindan Nair, CJ.—The order impugned in these five writ petitions is the one dated 14th July, 1976 passed by the Railway Board, the first respondent, reverting the five petitioners who were on that date holding the post of A Grade Guards having their lien in B Grade to the lower post of B Grade Guards. Counsel for the petitioners contended that the order dated 14th July, 1976 of the first respondent was passed on a misunderstanding of the decision of the Supreme Court in *General Manager, South Central Railway* v. *T. Venkata Rao*[1]. The facts are the following.

2. There was a Grain Shop Department to supply provisions to the railway staff. The petitioner in these five writ petitions were appointed respectively on 24th September, 1944, 17th March, 1945, 25th June, 1943, 24th June, 1943 and 24th June, 1943, the petitioner in Writ Petition No. 4164 of 1976 as attender and the petitioners in the other writ peti-

1. (1975) 4 S.C.C. 619: A.I.R. 1976 S.C. 678.

tions as clerks. The Grain Shop Department was wound up in 1949 and on the winding up of the Grain Shop Department all the petitioners were absorbed as brakesmen in the permanent department. The principle of fixation of salary as well as the determination of seniority was laid down by a circular of the Railway Board dated 16th October, 1952. Since we are concerned in this case only with the question of seniority, we shall extract that part of the circular which specifically relates to the question of seniority and that is contained in the last sentence of the circular:

> "They should be given only such seniority which they would have got had they been absorbed in the absorbing department right from the beginning of service".

3. This sentence was put in because, as far as fixation of pay was concerned, the absorbed persons were entitled to have their pay fixed taking into account what they were drawing and by reckoning the service which they have rendered in the Grain Shop Department. Such a procedure may result in the position that a person with lesser service will receive a higher pay. To avoid such persons getting higher pay and also getting seniority over persons in the Grain Shop Department having longer service, the last sentence has been incorporated. But that sentence also clearly and unambiguously lays down that the seniority after absorption in the absorbing department must be such that they would have if they were treated as having been absorbed right from the beginning of their service in the absorbing department. This means that those absorbed could carry with them their service in the Grain Shop Department. No distinction was sought to be made between persons who were absorbed as clerks and others who have been absorbed as in the case of the five petitioners as brakesmen, or for that matter, in any other capacity in the absorbing department. From the wording of the circular, the general provision to be applied was that the service in the Grain Shop Department will be available for those who have been absorbed in the permanent department. That is how the circular was also understood by the Railway Board and accordingly the petitioners had their seniority fixed by taking into account their services in the Grain Shop Department. This resulted in their being promoted as A Grade Guards. We need not refer in detail to two of the decisions of the Railway Board, one in 1957 and the other on 13th January, 1961, for, the order dated 13th January, 1961, restored the position as we have stated above.

4. In the case of certain 'Class III' persons as they were called, *i.e.*, those who were temporarily absorbed into the temporary Grain Shop Department and who were later taken into the permanent department, the Railway Board decided not to allow them the service they have had in the Grain Shop Department for fixing their seniority in the permanent absorbing department. Those persons who were thus denied their service in the Grain Shop Department challenged the discrimination, as they called it, in proceedings under Article 226 of the Constitution before the Andhra Pradesh High Court and the Andhra Pradesh High Court held that there was no justification for denying them the services they have had in the Grain Shop Department. The Railway's appeal before the Supreme Court failed and the Supreme Court confirmed the view of the Andhra Pradesh High Court.

5. Some of the persons who have been absorbed as clerks in the permanent absorbing department volunteered to be appointed as Assistant Station Masters and they were chosen and appointed as Assistant Station Masters. The persons so appointed as Assistant Station Masters took up the position that they were entitled to have their seniority fixed in the cadre of Assistant Station Masters by taking into account the seniority they had in the clerical cadre fixed on the basis of the principle that their Grain Shop Department's service must also be counted. In dealing with this question, the Supreme Court in the decision reported in *The General Manager, South Central*

Railway v. *T. Venkata Rao*[1], observed **in paragraph 5 of the judgment** which we shall extract in full; for, the arguments in this case, to a very large extent, turned on the construction we have to place on the said paragraph of the Supreme Court judgment:

"As respects the cases of Respondents Nos. 4, 5 and 33 who were respectively Petitioners Nos. 4, 5 and 34 in the writ petition, the appellants' case was they had been drafted into other cadres. They were originally given their seniority in the cadre of Commercial Clerks as it was given to the other Grain-shop Clerks. But later they volunteered for promotion as Assistant Station Masters in the years 1955 and 1956 earlier to the receipt of the revised instructions of the Railway Board in the years 1957 and 1961. They were confirmed as Assistant Station Masters and thereupon they ceased to have any lien in the cadre of Commercial Clerks. As regards Respondent No. 27 who was Petitioner No. 28 in the writ petition, certain other facts were pleaded showing that he had also gone to a different cadre. The learned single Judge did not make any clarification or distinction in the application of the instruction issued in the year 1952 in cases of Respondents Nos. 10, 4, 5, 27 and 33. Argument put forward by learned counsel for the appellant is that determination of seniority on the basis of the decision of this Court in *Siddhanti's case*[2], would be only applicable in the cadre of clerks and not in any other cadre lower or higher. The grievance is justified to some extent. Primarily the instructions issued in the year 1952, which were held to govern the cases of the employees like the respondents were for determination of seniority in the cadre of clerks. It was not meant to override any other instruction, rule or directions concerning the determination of seniority in any other cadre. For instance if a person had become a confirmed Assistant Station Master earlier than any of the Respondents Nos. 4, 5 and 34, the latter could not count his entire period of working in the clerk's post for getting seniority over the former. If, however, the seniority determined on the basis of the decision of this Court in *Siddhanti's case*[1], was to be reflected in determination of the seniority in any other cadre to which any of the respondents might have gone, then the seniority in the cadre of the clerk will have to be determined on the principles laid down in *Siddhanti's case*[1]."

It is seen from the portion of the judgment extracted that their Lordships have repeatedly referred to the clerical cadre and there are even expressions showing that the principle of carrying over the service in the Grain Shop Department will apply only to the clerical cadre. Counsel for the Railway, therefore, was seemingly justified in contending that if the question of seniority in any cadre, other than the clerical cadre arose for determination the principle of the Supreme Court case should be applied.

6. But we think that we must understand this decision of the Supreme Court in the light of the specific contentions which had been raised before the Supreme Court. We must also remember that the case did not deal with the initial absorption in accordance with the principle laid down by the Railway Board itself, by circular, dated 16th October, 1952. The judgment dealt with a case where the persons so absorbed initially, voluntarily left the post of clerks and discarded their normal avenues of promotion and chose to opt for what are called ex-cadre posts as Assistant Station Masters. We cannot understand the Supreme Court as having laid down that in the initial absorption, if the employer due to exigencies of the situtION and in the exercise of managerial functions decided that the absorption should not be only to clerical cadre but

1. (1975) 4 S.C.C. 619 : A.I.R. 1976 S.C. 678.
2. ((1974) 3 S.C.R. 207 : (1974) 4 S.C.C. 335 : A.I.R. 1974 S.C. 1755.

1. (1974) 4 S.C.R. 207 : (1974) 4 S.C.C. 335: A.I.R. 1974 S.C. 1755.

must be in such posts where the absorbed persons can be more conveniently and, particularly, more usefully employed, all the persons absorbed cannot be treated similarly one section having the benefit of the services rendered by them in the Grain Shop Department and another section not getting that benefit. That will be clearly discriminatory, as such a procedure would amount to denying to some what has been given to others. But in fact the Railways did not so discriminates. They gave the brakesmen, the petitioners, the benefit of their services they have had in the Grain Shop Department as early as in 1949 and they were also duly promoted to the cadre of guards and they remained as guards till the decision of the Supreme Court was rendered in the case which we have just referred to above. The passage which we have extracted and tried to understand gave rise to doubts and the Railway Board, we think, have misunderstood the dicta in passing the order, dated 14th July, 1976 and the consequential further orders reverting the five petitioners from Guards Grade A to Guards Grade B. We see no justification for this. The decision of the Supreme Court cited above does not support such a procedure. We, therefore, set aside the order of the Railway Board, dated 14th July, 1976 as well as the consequential orders by which the petitioners have been reverted to the post of Guards Grade B from the post of Guards Grade A and and direct that the posts held by the five petitioners before the order of the Railway Board, dated 14th July, 1976 be restored to them with consequential benefits and their services continued in the cadre of Guards Grade A. We direct the parties to bear their respective costs in these petitions.

S.J. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—V. *Balasubrahmanyan, J.*

R. Singaravelu .. .. *Appellant**

v.

Govindasami Chettiar .. *Respondent.*

Transfer of Property Act (IV of 1882), section 91—Tamil Nadu District Municipalities Act (V of 1920), section 332—Property tax — Liability of landlord paid by tenant as statutory liability—Tenant entitled to reimbursement—Before full reimbursement by adjustment of rent payable, tenant evicted from premises—Suit by tenant for a charge decree in respect of the balance of amount—Tenant entitled to subrogation.

A tenant who was in occupation of a non-residential building within the municipality of Kumbakonam was paying the municipal property tax which was actually payable by the landlord. The tenant had paid Rs. 956.86 to the municipality and the tenant was adjusting it towards the rent payable by him. However, the tenant was evicted before he could adjust the entire amount of tax paid by him and there was a balance of Rs. 540.28 for reimbursement. So the tenant filed a suit against the landlord for a charge decree for the recovery of the amount on a charge of the very property. He claimed this relief as a subrogee from the municipality which had a statutory charge over the property for the tax due on it. The suit was decreed as prayed for and confirmed on appeal.

On second appeal,

Held: On the principle that any tenant in occupation of an item of property subject to a simple mortgage had an interest in the equity of redemption, it should follow that he would be one of the persons entitled to subrogation under section 91 of the Transfer of Property Act. [*Para.* 9.]

* S.A. No. 74 of 1974. *6th October*, 1977.

Although he was characterised as a tenant at will, it should be noticed that he was in occupation of what was described as "non-residential building" within the Municipal limits of Kumbakonam. As such, the occupation of the building as well as the terms of the tenancy should be subject to the provisions of the Madras Buildings (Lease and Rent Control) Act. The tenant would, therefore, be properly described as a statutory tenant having rights of occupation, governed by the overriding provisions of the statute rather than by any terms of the contract between him and his landlord. In this view, therefore, there could be practically no difference between a tenant for a term of years and a statutory tenant with such rights as were conferred on him by the statute. In this case, the tenant should be regarded as a person having a right to redeem the charge in favour of the Municipality, and he having paid the municipal taxes, should be regarded as subrogated to the position of the Municipality entitled to enforce the charge against the landlord. [*Para.* 10.]

Under section 332 of the Madras District Municipalities Act, 1920, the tenant as occupier of the property was under duty bound to pay the municipal property tax. This right for the purpose of section 91 could not be less than that of a lessee paying the taxes or discharging the mortgage of his landlord on the basis of an agreement. [*Para.* 11.]

Case referred to:—

Pannalal v. *Rajaram,* (1926) 96 I.C. 973.

Appeal against the decree of the Court of the Principal Subordinate Judge, Kumbakonam, in Appeal Suit No. 54 of 1971 preferred against the decree of the Court of the District Munsiff of Kumbakonam in Original Suit No. 57 of 1969.

S. W. Kanakaraj and *S. Sundaragopal,* for Appellant.

K. Sarvabhauman and *S. Kasinathan,* for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises a nice point about rights of subrogation which a tenant of a building may claim against his landlord while seeking reimbursement through a Court of law of the municipal property tax which he has paid as occupier of that building. The question turns on a true construction of the relevant provisions of the Transfer of Property Act, 1882, and the Madras District Municipalities Act, 1920.

2. The tenant in this case was in occupation of a certain non-residential building within the municipal limits of Kumbakonam Town. He had been paying the municipal property tax on the building for some time. So far as the agreement of lease between him and his landlord was concerned, the liability for the rates had to be borne wholly by the landlord. Nevertheless the tenant was meeting the half-yearly demands from the Municipality for the property tax only in virtue of his statutory liability as occupier of the building. Upto a certain time, such payments by him to the municipality amounted to Rs. 956.86. Under the relevant statutory provisions relating to tax recovery by municipalities, the tenant was entitled to obtain reimbursement from his landlord of the amounts paid by him as tax for the property in his occupation. This reimbursement he was entitled either by way of adjustment against the rent due by him or otherwise.

3. In this case, before the tenant could fully adjust the payment of property tax against the rents accruing due, the landlord obtained an eviction order from the Rent Controller and took possession of the building from the tenant. As on the date of vacant possession, the tenant owed the landlord rent for the premises for some months, but they amounted only to Rs. 416. But this left a balance of Rs. 540.28 towards reimbursement of property taxes already paid by him for the property. Hence he sued the landlord for the amount, asking for a charge decree, directing the recovery of the amount from the landlord on a charge of that very property. He claimed the right to this relief as a subrogee from the Municipality which had a statutory charge over the property for the property tax due on it.

4. The landlord resisted the tenant's suit on two main grounds which, in their very nature, were inter-related. One was that the tenant was not entitled to any subrogation of the rights of the Municipality in respect of the property tax paid by him. The other was that the suit was barred by limitation as a simple money suit.

5. The trial Court rejected both the contentions. It held that the tenant was entitled to sue the landlord for a charge decree in virtue of his having been subrogated to the rights of the Municipality. Following up this determination the trial Court held that the period of limitation for a suit of this kind was 12 years under Article 62 of the Schedule to the Limitation Act, 1963. On the facts it was found that the suit had been filed within this time-limit. The trial Court accordingly directed the landlord to pay the amount within three months and granting leave to the tenant to apply to the Court for bringing the property for sale in the event of default in payment of the amount decreed within the time stipulated.

6. The landlord appealed to the Sub-Court, Kumbakonam raising the same contentions as during the trial. The learned Subordinate Judge, however, rejected them and confirmed the preliminary decree. The landlord has now brought the matter in second appeal.

7. The charge on the suit property, the benefit of which is claimed by the tenant in this case, is a charge not by agreement between him and his landlord, but by operation of law. Payment of municipal property tax to the Municipality is a statutory liability under the Madras District Municipalities Act, 1920. Under section 85 of that Act, it is a first charge on the property. Section 332 of the Act confers a right of reimbursement on the occupier of the property to reimburse himself from the landlord the amounts he has paid to the municipality by way of property tax to the building under his occupation. Section 100 of the Transfer of Property Act, 1882 does cover such charges. The same provision, section 100, it may be observed, expressly adopts all the provisions in the Transfer of Property Act relating to simple mortgages to charges as well, so far as may be. Learned counsel for the appellant accordingly invited my attention to section 91 of the Transfer of Property Act to find if the claim of the tenant in this case to subrogation can be placed within the four corners of that section. His argument was that section 91 (*a*) applies only to persons who have an interest in or upon the property mortgaged or in or upon the right to redeem the mortgaged property. He pointed out that in the present case the tenant was a tenant at will, the tenancy not being for any term of years certain. On this basis, learned counsel argued that the tenant in this case cannot invoke section 91. It was but a step from this argument for learned counsel to contend that the suit for reimbursement filed by the tenant cannot have been filed as a mortgage suit for the purpose of taking advantage of the longer period of time provided by the Limitation Act for suits of that kind. Learned counsel cited a decision in support of his contention reported in *Pannalal* v. *Rajaram*[1], a decision of the Nagpur Judicial Commissioner. That case raised the applicability of section 91 of the Transfer of Property Act to a lessee from the mortgagor. In the course of his judgment, the learned Judicial Commissioner observed:

> "After the creation of a valid mortgage what is left with the mortgagor is the equity of redemption. If the mortgage is without possession, the mortgagor's equity of redemption comprises also the right to enjoy the mortgaged property. Consequently, if the mortgagor grants a lease of the mortgaged property to another, the latter becomes a transferee of a portion of the equity of redemption and as such is a person having an interest in the property or at least in the right to redeem the property within the meaning of section 91, clauses (*a*) and (*b*) of the Transfer of Property Act."

1. (1926) 96 I.C. 973.

8. Learned counsel for the landlord, however, sought to build his argument on the following further observations of the learned Judicial Commissioner:

> "..........I hold that the words 'any person having any interest in the property' or 'any person having an interest in the right to redeem the property' as used in section 91 of the Transfer of Property Act are sufficiently wide to include a lessee for a term of years."

9. Learned counsel emphasised the words "term of years" occurring in the passage last cited, and urged that the principle of this decision was confined only to a lessee for a term of years and cannot be applied to such cases as the present where the tenancy is precarious and is for an uncertain duration. I am unable to accept this contention. The passage last cited from the judgment of the learned Judicial Commissioner can be explained by reference to the arguments addressed in that case. The argument there was that even a lessee had a right to redeem and can claim under section 91 to be subrogated to the position of a mortgagor. This argument was sought to be minimised by reference to certain earlier authorities which had applied section 91 to lessees who in those earlier cases happened to be holders of permanent tenures. It was only by way of discounting the validity of the distinction sought to be made as between permanent lessees and other kinds of leases that the learned Judicial Commissioner made the observation that even in cases where the lease is for a term of years, the lessee in question would have the right of subrogation under section 91. The question whether a tenant at will in occupation of a mortgaged property has any such right was not discussed in the said judgment, for, on the facts of that case, there was no occasion for the learned Judicial Commissioner to discuss that point. In my view, on the principle that any tenant in occupation of an item of property subject to a simple mortgage has an interest in the equity of redemption, it must follow that he would be one of the persons entitled to subrogation under section 91 of the Transfer of Property Act.

10. There is yet another consideration which would operate in favour of the tenant in this case. Although he is characterised as a tenant at will it must be noticed that he is in occupation of what is described as "non-residential" building within the municipal limits of Kumbakonam. As such, the occupation of the building as well as the terms of the tenancy must be subject to the provisions of the Madras Buildings (Lease and Rent Control) Act. The tenant would, therefore, be properly described as a statutory tenant having rights of occupation, governed by the overriding provisions of the statute rather than by any terms of the contract between him and his landlord. It is notorious that this statute protects the occupation of tenants of such buildings and the tenants are liable to eviction only on certain grounds being made out by the landlord to the satisfaction of the Rent Controller. In this view, therefore, there can be practically no difference between a tenant for a term of years and a statutory tenant with such rights as are conferred on him by the statute. Hence, even giving a restricted application to the principle decided in *Pannalal* v. *Rajaram*[1]. I am satisfied that in this case the tenant must be regarded as a person having a right to redeem the charge in favour of the Municipality, and he having paid the municipal taxes, must be regarded as subrogated to the position of the Municipality entitled to enforce the charge against the landlord.

11. In my view, on the language of section 91 of the Transfer of Property Act, the position of a tenant who pays statutory dues to the Municipality should be regarded as an *a fortiori* case. With reference to such a person it may be truly said that what he possesses is not just a mere "right" to redeem. It is something more. Under section 332 of the Madras District Municipalities Act, 1920, the tenant, as occupier of the property, is under duty bound to pay the municipal property tax. It seems to

1. (1926) 96 I.C. 973.

me, therefore, that his right for the purpose of section 91 could not be less than that of a lessee paying the taxes or discharging the mortgage of his landlord on the basis of an agreement.

12. For all the above reasons, I feel that the judgment and decree of the learned Subordinate Judge are correct in law. The second appeal is dismissed but in the circumstances, without costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

R. P. Ganesan and others .. *Appellants**

v.

The Collector of Madras .. *Respondent.*

Land Acquisition Act (I of 1894), *section* 25—*Land belonging to temple acquired by Government—Trustees preferring claim of Rs.* 250 *per ground—Change in trustees—New trustees making claim for enhanced compensation at the rate of Rs.* 1,250 *per ground*—*Reference under section* 18 — *Claim rejected by civil Court — Appeal by trustees—New trustees held bound by claim made by the old trustees.*

Temple lands were sought to be acquired by the Government and the then trustees preferred a claim of Rs. 250 per ground as compensation. An award was passed by the Land Acquisition Officer. Subsequently there were changes in the trustees and the new trustees preferred a claim for enhanced compensation at the rate of Rs. 1,250 per ground. A reference was made under section 18 on the direction of the High Court. However, the civil Court declined to decree the claim of the new trustees.

On appeal,

Held: The successors to public bodies should suffer all the resultants of the acts of their predecessors. In the absence of proof of negligence it could not be said that the prior administrators of the Devasthanam omitted to make a claim; far from it. On the other hand, they did make a claim which was certainly not an omission to make a claim. The successors-in-interest of the quondam trustees were bound by the claim made by their predecessors. [*Para.* 7.]

Cases referred to:—

Collector of Madras v. *K. Gokhale*, (1976) 1 M.L.J. 3 (S.N.); *Gopayya* v. *Deputy Collector of Tenali*, (1922) I.L.R. 45 Mad. 421: 15 L.W. 366: 42 M.L.J. 298: A.I.R. 1922 Mad. 100 (2).

Appeal against the decree dated 24th December, 1965 of the City Civil Court (4th Assistant Judge), Madras in L.A.C. No. 103 of 1962.

T. Aravamuda Ayyangar, A. P. Venkatachalam and *M. A. Srinivasan*, for Appellant.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—This appeal is against the judgment of the Fourth Assistant Judge, City Civil Court, Madras in L.A.C. No. 103 of 1962. Briefly, we can state the necessary facts relevant for consideration: On 15th, September, 1954 a notification under section 4 (1) of the Land Acquisition Act (hereinafter called the Act), was made to compulsorily acquire 28-88 acres of land belonging to the appellants and comprised in S. No. 1|1 of Ayanavaram for the purpose of constructing quarters for the staff attached to the Integral Coach Factory. The appellants-Devasthanam were at all material times represented by the trustees appointed by competent authorities and the body of trustees,

* App. No. 64 of 1972. *2nd February*, 1977.

who were then functioning, on receipt of the notice of enquiry into the subject from the Land Acquisition Officer under sections 9 and 10 of the Act, preferred their objections and in particular made a claim requesting the grant of a compensation at the rate of Rs. 250 per ground. Thereafter, apparently no appearance was made by them and this resulted in the Land Acquisition Officer passing an award on 6th May, 1955. At the time of the passing of the award the claimants were not present. The Land Acquisition Officer issued the usual notice under section 12 (2) of the Act. Such notices were admittedly issued on 23rd July, 1955. For reasons not very clear, the trustees of the Devasthanam again made a claim increasing their demand from Rs. 250 to Rs. 1,250 per ground. The Land Acquisition Officer himself rejected a request for re-enquiry into the subject-matter which apparently the trustees then wanted. The order of rejection was made on 21st September, 1955. Then the Devasthanam once again reiterated their stand and wanted a reference under section 18, not being satisfied with the award passed by the Land Acquisition Officer on 6th May, 1955. As by then the time available in law for such references under section 18 of the Act was over, the Land Acquisition Officer, who had no jurisdiction to refer such belated applications for reference to civil Courts, rejected the petitioners' application for reference dated 5th November, 1955 on 11th November, 1955. Thereafter the Devasthanam filed two writ petitions: *Chennai Sri Ekambareswarar Devasthanam by Trustees, A. N. Parasuraman and 2 others* v. *Collector and Land Acquisition Officer, Madras*[1]. They prayed for a writ of *mandamus* directing the Collector and the Land Acquisition Officer, Madras to refer the matter relating to award No. 5 of 1955 regarding the appellants' lands to the Principal Judge, City Civil Court, and also sought for a similar writ for a fresh enquiry into the subject-matter under section 11 of the Act. In fact, the prayer for reference under section 18 of the Act on the foot that their earlier application to the statutory authority was rejected by him was an alternate to the other request for the issuance of a writ of *mandamus* to hold a fresh enquiry under section 11 of the Act in regard to the fixation of the compensation for the lands of the appellants. In the affidavits in support of the writ petition, the appellants averred that there was a change in the Board of Trustees and when the new trustees took charge they became aware that the claim made by the quondam trustees was grossly inadequate and would also accuse the erstwhile trustees of gross negligence resulting in considerable loss to the institution. They ultimately, as already stated in the alternative asked for a reference under section 18 of the Act on the ground that they did not have any knowledge of the passing of the award and that therefore the lapse of time was to be condoned. Srinivasan, J., who went into the question observed thus:

> "It is not denied by the petitioner that all the notices that a person interested was entitled under the provisions of the Act upto the stage of making of the award were in fact issued and served upon the petitioner. The petitioner's further claim that the then trustees were guilty of gross negligence in making a claim only for compensation at the very low figure of Rs. 250 per ground, does not arise for consideration here. In these circumstances, there can be no question of directing a fresh enquiry."

But the learned Judge, on an overall appreciation of the case, was satisfied that the appellants should be given an opportunity and therefore he issued an order directing the Collector to refer the application made by the trustees under section 18 of the Act to the civil Court having jurisdiction. It was in those circumstances that the reference was made to the learned City Civil Judge at Madras.

2. In the Court below the same point was reiterated by the appellants and they urged that consequent upon the mistaken claim made by the quondam trustees

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1. W.P. Nos. 906 and 907 of 1955.

which sloped down from their negligence a proper and just claim could not be made in time and therefore they requested the Court below to consider their increased claim for compensation and effectively wanted a rehearing of the entire award proceedings. The learned Judge did not countenance the argument. In so far as the claim of the appellants for increased compensation was concerned, he invoked section 25 (1) of the Act and, finding no sufficient cause or omission in the making of the claim on the part of the Devasthanam as such would not even countenance the request of the claimants for an increased compensation as there was a statutory bar for such grant under section 25 (1) of the Act. In the result, therefore, he decreed that the appellants were not entitled to any enhanced compensation. It is as against this the present appeal has been filed.

3. This is a very unfortunate case in which a public institution is running from pillar to post to get their just compensation. As ignorance of law is no excuse and as the necessary evil in that doctrine has to work against a person as well as against an institution, the appellants, as would be seen hereafter, cannot be helped.

4. From the hypothesis sought to be placed by the appellants in the Court below, it appears that the claimants would be entitled to more compensation than what was granted under the award. But the point for consideration and which was the only point urged before us by Mr. N. S. Raghavan, is whether, in the circumstances of the case, the Devasthanam has the legal right to claim an increased compensation over and above the quantum claimed in the initial stages in the award enquiry before the Land Acquisition Officer. It is common ground that the Devasthanam represented by its then trustees at the appropriate time asked for compensation at the rate of Rs. 250 per ground. There was a change in the Board of trustees and the successor Board realising that the compensation claimed was ridiculously low sought for increased compensation. Whether this could be done and whether a re-enquiry on the foot that the quondam trustees were negligent in the discharge of their official duties in not making a proper and just claim could be gone into in the teeth of section 25 (1) of the Act is the question.

5. Mr. Raghavan would say that there is no estoppel on the part of the claimants in seeking an increased compensation. Understanding it as a general contention it is well-founded. But the contention has to be applied to the facts in the case and in the light of the statutory provision with reference to it; it is not disputed before us that if a perfect and a legal claim has been made under section 25 (1) by a claimant under the Act, then the law precludes from changing over and making an increased compensation in the sense that it is over and above the rate of compensation claimed earlier. There is only one exception to this generic principle which is contained in section 25 (2) and (3) of the Act. That exception is couched in the following language:

> "*Section* 25 (2): When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court shall in no case exceed the amount awarded by the Collector".

Reading this exception contained in sub-section (2) of section 25 in conjunction with the relatively equitable provision in sub-section (3) of section 25, it is clear that when the applicant has omitted for a sufficient cause to make such a claim, then the Court of reference may award to him an amount in excess of the amount awarded by the Land Acquisition Officer. But the foundation of such an equitable grant is that the applicant omitted with sufficient reason to make such a claim. What is sufficient reason cannot be iron-jacketed and it has to necessarily vary with the facts and circumstances of each case. But what is refusal is apparent and needs no further elucidation. If the applicant has refused to make a claim then he has no option except to take such compensation granted to him by the Collector and cannot ask for any amount

in excess thereof, inspite of the fact that he has successfully sought for a reference under section 18 of the Act and the Civil Court is in seisin of the same. But in a case where it is proved by material that the omission to make a particular quantum of a claim was with sufficient reason and if the Court of reference on reasonable enquiry is satisfied that there was such sufficient reason for the claimant in not having asked for an amount in excess of that claimed by him originally before the Land Acquisition Officer then the Court's power to invoke the beneficial provision of sub-section (3) of section 25 of the Act is not taken away. In fact in a recent decision in *Collector of Madras* v. *K. Gokale*[1], this Division Bench referred to these provisions in the following manner:—

> "The rigour of section 25 (2) of the Land Acquisition Act is mitigated by section 25 (3) according to which the Court, on being satisfied that there was sufficient reason for the claimant's lapse under section 25 (3) can award a sum in excess of the amount awarded by the Collector".

It is therefore a primary requisite that the civil Court should be satisfied about the *bona fides* of the claimant's conduct and the reason given for his lapse in not having made a proper claim before the proper authority in appropriate time.

6. Mr. Raghavan's contention is that the negligence pleaded by the appellants both before the trial Court and before us is an indicia of sufficient cause. We may at once state that when they sought for a reference on 5th November, 1955, the Devasthanam stated thus:

> "We are surprised that we have had no notice from you regarding the passing of the award in the above. In fact, we applied to you for amending our claim and we expected that you will fix a date for the hearing of the said petition. However, you have now informed us that an award was passed in May, 1955. We have already intimated to you that the claim made at the rate of Rs. 250 per ground was a mistake for Rs. 1,250 having regard to the market value of the land. It is also found that you have made no reference in the award to our claim regarding the tank and the temple, and the award is incomplete and not in order. The compensation given is totally inadequate and all the claims put forward have not been dealt with.
>
> We request you to refer the award to the Chief Judge, Court of Small Causes, Madras, under section 18 of the Land Acquisition Act."

There was no whisper about the negligence of the erstwhile Board of trustees. In the above letter, the ground mentioned was 'mistake'. Even before the trial Court no attempt was made to prove negligence or fraud on the part of the quondam trustees. The finding is that there is absolutely no evidence to show that the trustees acted adversely or fraudulently to the interest of the trust and in consequence there was gross negligence on their part. Srinivasan, J., in the writ petition rightly observed that there was no plea to go into that question as it was not necessary for him to do so. But when the necessity arose the appellants did not take any effort to substantiate their allegation.

7. Then the next question is whether there was any omission in the matter of making a claim within the meaning of section 25 (2) of the Act. We have already made it clear that this is not a case where an applicant refused to make a claim. The omission referred to in sub-section (2) of section 25 is referable to an overt act on the part of the applicants themselves. It cannot be said that in the instant case the act of the quondam trustees is something very different or should be understood so from the act of the trustees who succeeded. In such public institutions it is common to expect the Board of trustees to change from time to time. The successors to such public bodies should therefore suffer all the resultants of the acts of their predecessors. In the absence of proof of negligence it cannot be said that the prior administrators of the Devasthanam omitted to make a claim; far from it. On the

1. (1976) 1 M.L.J. (S.N.) 3.

other hand, they did make a claim which is certainly not an omission to make a claim. Only if an omission has occurred, the question whether such an omission was with or without sufficient reason can arise for consideration. But when a claim has been made by the previous administrators, we fail to understand the contention that there was an omission to make a claim. The successors in interest of the quondam trustees are bound by the claim so made by their predecessors. It therefore follows that in the instant case and having regard to the facts therein it cannot be said that there was any omission to make a claim as required under the provisions of the Land Acquisition Act. Reliance is sought to be placed on a decision of our Court in *Gopayya* v. *Deputy Collector of Tenali.*[1] That was a case where the learned Judges said that a reversioner to the estate of a Hindu widow is not her legal representative and is not bound by her acts on any principle of estoppel. It was in those circumstances they entertained in equity the representations made by the reversioner independent of the Hindu widow after the passing of an award and accepted him as a person interested in securing compensation by seeking for a reference under section 18 of the Act. The principle therein is unassailable but it does not apply to the facts of this case.

8. No question of estoppel arises in this case. But on the other hand the Board of trustees who succeeded another Board of trustees cannot maintain that they have an individuality different from the previous board and that they could ignore the relative acts done by the quondam Board and proceed on the foot that on assumption of their office they are persons totally different from and independent of the quondam Board and that the proceedings should start fresh in so far as they are concerned particularly in the matter of seeking for compensation or seeking for enhanced compensation under the provisions of the Act. The lower Court was therefore right in rejecting the claim for increased compensation. This is so because the appellants as Board of trustees (may be a different set of trustees) claimed only a sum of Rs. 250 per ground. This was granted by both the Land Acquisition Officer and the civil Court. The civil Court did not grant any excess compensation because it had no jurisdiction to do so. Under these circumstances, the appeal fails and is dismissed. But, as we characterised these proceedings as an unfortunate one, there will be no order as to costs.

S.J. ——— *Appeal dismissed.*

1. 42 M.L.J. 298 : 15 L.W. 366 : (1922) I.L.R. 45 Mad. 421 : A.I.R. 1922 Mad. 100 (2).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

S. Venkataraman .. *Petitioner**

v.

The Deputy Registrar of Co-operative Societies, Thanjavur and others .. *Respondents.*

Tamil Nadu Co-operative Societies Act (LIII of 1961), *sections* 65, 71—*Constitution of India* (1950), *Article* 226—*Co-operative Sub-Registrar accused for loss—Notice under section* 71 (1) *issued* —Explanation *filed not accepted*—Ex parte *statements used against the Sub-Registrar and order of surcharge passed —Validity challenged — Violation of principle of natural justice in not giving petitioner opportunity to cross-examine witnesses — Writ of* certiorari *issued quashing order.*

The petitioner was a Co-operative Sub-Registrar. Under section 65 of the Tamil Nadu Co-operative Societies Act an enquiry was conducted against him. As a result of this a notice under section 71 (1) was issued to the petitioner to show cause why an order of surcharge should not be passed against him. The petitioner submitted his explanation submitting that statements obtained from

* W.P. No. 4953 of 1975. 16*th November*, 1976

various persons behind his back should not be relied on. However, an order of surcharge was passed against the petitioner. Thereafter the petitioner preferred an appeal to the Co-operative Tribunal and this was dismissed.

Held: Undoubtedly if a liability was sought to be fastened to the petitioner on the basis of certain statements, he should be given an opportunity to cross-examine those witnesses. But no such opportunity was ever afforded to the petitioner. Merely because the petitioner did not specify the documents which he wanted to peruse, it would not mean that it would cure the failure to afford an opportunity. So also, the fact that he had a remedy by way of appeal to the Co-operative Tribunal was not a substitute for not affording an opportunity since the same handicap which was prevailing before the original authority would continue to prevail. In the result, on the simple ground of violation of the principles of natural justice, the writ petition was liable to be allowed and the impugned order quashed.

[*Paras*. 4 *and* 5.]

Case referred to:—

Soundaram v. *Entertainment Tax Officer*, (1969) 2 M.L.J. 6.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in R.C. No. 16758|68-E dated 3rd April, 1970 and of the 2nd respondent in C.M.A. No. 1 of 1971 dated 15th October, 1974 and quash the proceedings of the respondents 1 and 2 dated 3rd April, 1970 and 15th October, 1974, respectively.

R. Krishnamoorthy, for Petitioner.

N. R. Chandran, for Government Pleader, for First Respondent.

R. G. Rajan, for Third Respondent.

The Court made the following

ORDER.—This writ petition is filed to quash the order of the first respondent (Deputy Registrar of Co-operative Societies, Thanjavur) made in R.C. No. 16758|68-E dated 3rd April, 1970 as confirmed by the second respondent (The Co-operative Tribunal (District Judge), West Thanjavur) in C.M.A. No. 1 of 1971 dated 15th October, 1974.

2. The petitioner herein is the Co-operative Sub-Registrar and he was serving in that capacity during the period from 25th December, 1965 to 21st January, 1968 in the third respondent society. Under section 65 of the Tamil Nadu Co-operative Societies Act (hereinafter referred to as the Act), an enquiry was conducted into the affairs of the Society. On 19th September, 1969 the first respondent issued a notice under section 71 (1) of the Act calling upon the petitioner to show cause why an order of surcharge should not be passed against him for the loss of Rs. 26,000 and odd. The petitioner submitted an explanation on 29th November, 1969 contending that the person in charge of the assets and other stocks, cash etc., of the Society was the President. But one of the foremost contentions was that the Department was not entitled to place reliance upon the statements obtained from the various persons behind the back of the petitioner. An order was passed on 3rd April, 1970 surcharging him to the tune of Rs. 26,552.92 with a direction to pay interest at 12 per cent. per annum. Aggrieved by the said order, the petitioner preferred C.M.A. No. 1 of 1971 before the second respondent and that appeal was also dismissed by the judgment dated 15th October, 1974. It is under these circumstances, the present writ petition has been filed.

3. The main ground of attack though several grounds have been raised attacking the order of the second respondent urged by Mr. R. Krishnamurthi learned counsel for the petitioner is that under section 71 of the Act when the liability is sought to be fixed as against the petitioner, who was no other than the Secretary to the tune of Rs. 26,000 and odd, there ought to have been an enquiry. At any rate, it was submitted, that when the petitioner in his reply to the show cause

notice made it specifically clear that the *ex parte* statements obtained against him from the various persons should not be used against him and in so far as they were used against the petitioner in passing the order of surcharge, there is a clear violation of the principles of natural justice and on this ground alone the order is liable to be set aside. The learned Government Pleader would contend that section 71 by itself does not contemplate any enquiry. The basis for taking action under section 71 is the report under section 65 of the Act, and in the instant case a show cause notice was issued against the petitioner and not being satisfied with the explanation given by him, the order of surcharge came to be passed, and the petitioner at that stage was called upon to state the documents which he wanted to peruse. But he did not avail himself of the opportunity and therefore it is not correct to contend that it is a violation of the principles of natural justice.

4. Section 65 of the Act contemplates an enquiry into the affairs of the Society. When an enquiry takes place under that section, it would reveal the loss sustained by the Society. In order to fix the individual liability to surcharge, section 71 will have to be resorted to by the departmental officials. Whether a further enquiry under section 71 will have to be conducted or not is not a point which calls for my decision in view of my following finding about the violation of the principles of natural justice. In the instant case, a show cause notice was issued. No doubt, in reply to that notice, the petitioner contended that statements obtained behind his back should not be used against him without his being given an opportunity to question the correctness of that statement. Nevertheless, it is conceded by the learned counsel appearing for the department that those *ex parte* statements were used against the petitioner when passing ultimately the order of surcharge. Undoubtedly if a liability is sought to be fastened to the petitioner on the basis of certain statements, he should be given an opportunity to cross-examine those witnesses. But no such opportunity was ever afforded to the petitioner. Merely because the petitioner did not specify the documents which he wanted to peruse, it will not mean that it will cure the failure to afford an opportunity. So also, the fact that he had a remedy by way of appeal to the Co-operative Tribunal is no substitute for not affording an opportunity since the same handicap which was prevailing before the original authority would continue to prevail. In this connection, a reference may be made usefully to the decision of a bench of this Court in *Soundaram* v. *Entertainment Tax Officer*[1]. The headnote of the said decision reads thus:

> "The materials collected by the Department behind the back of the assessee may well be used by the Department to initiate proceedings, but cannot be used, in such proceedings, to the prejudice of the assessee unless he has been given a proper and reasonable opportunity of answering such materials. The assessee can do so only if he was fully informed of the materials which the Department proposed to use against him, and given a reasonable time to think out his defence and make his objections. Therefore, it has to be held that there was infraction of natural justice".

5. In the result, on the simple ground of violation of the principles of natural justice, the writ petition is allowed and the impugned order is quashed. There will be no order as to costs in this petition. It is however made clear that notwithstanding the writ petition being allowed, the department is not in any way precluded from proceeding with the petitioner in any manner known to law.

S.J. ——— *Petition allowed.*

1. (1969) 2 M.L.J. 6.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*P. Govindan Nair, CJ. and A. Varadarajan, J.*

Ganeshmal Maggaji by his power agent Roopchand Maggaji .. *Appellant**

v.

The Central Board of Excise and Customs, New Delhi and others .. *Respondents.*

Imports (Control) Order (1955), *clauses* 3 (3) *and* 10-C—*Customs Act* (*LII of* 1962), *sections* 131, 111 (d)—*Constitution (Forty-second Amendment) Act* (1976), *section* 58—*Import of photographic films—Licence issued to appellant—Arrival of goods at Madras port — Licensee selling freezing plant before arrival and after arrival the Printing Press — Confiscation of imported goods by Customs Authorities under section* 111 (d) *of the Customs Act read with clause* 3 (3) *of the Import (Control) Order—Validity—Violation of condition in the licence happening after completion of import—Clause* 10-C *of Import (Control) Order applicable and not clause* 3 (3)—*Writ Petition dismissed before* 1*st February,* 1977—*Writ appeal filed—Whether petition pending on the appointed day—Petition did not include appeal.*

The appellant was a letter-of-authority holder for a firm to whom licence was issued for the import of photographic films. The goods were despatched on 24th July, 1974 and arrived at Madras Port and a Bill of Entry was filed on 18th September, 1974. The licence was dated April-March, 1974, and was valid for 18 months from the date of issue. The only other condition which came up for construction was clause 8 (ii) (*b*) which imposed an obligation on the licensee to utilise the goods imported, in the factory of the licensee specifically for the manufacturing process carried out by it. The licensee in this case had a refrigeration unit and also a printing press. Even before the goods arrived in the Port of Madras, the licensee had sold the freezing plant, and after the arrival of the goods, he had also sold the Printing Press. The Customs Authorities got information about those acts of the licensee. Thereupon they came to the conclusion that the licensee was not in a position to comply with the conditions of the licence and took the view that section 111 (*d*) of the Customs Act read with clause 3 (3) of the Import (Control) Order would enable them to confiscate the goods that had been imported by the licensee with the aid of the letter-of-authority-holder who had advanced moneys necessary for the import. This was challenged by the appellant whose writ petition was dismissed. According to the appellant, clause 10-C of the Import (Control) Order would apply to this case. The respondents contended that in view of section 58 of the Constitution (42nd Amendment) Act, 1976, the appellant would have to be denied relief as the writ petition itself had abated.

Held: The correct approach to understand the scope and effect of clause 3 (3) was by reading clause 3 (3) with clause 10-C and by attempting a harmonious construction of the two clauses so that both the clauses might co-exist and one did not impinge on the other or create conflict in their application.

When the violation was of a condition in the licence, which would normally be expected to happen after the import was completed as in the case of failure to utilise the goods for the purpose for which they were allowed to be imported, it was clause 10-C that would apply and not clause 3 (3). [*Para.* 7.]

The question was whether a writ petition that had been disposed of before 1st February, 1977 could be stated to be pending on 1st February, 1977, the appointed day. It was impossible to say that the writ petition was pending on the 'appointed' day'. The statute had not

*Writ Appeal No. 54 of 1977.

11*th August,* 1977.

imported any legal fiction by which it had provided that notwithstanding the dismissal of the writ petition, by virtue of the fact that an appeal had been taken by the writ petitioner, the writ petition should be deemed to be pending on the appointed day. The writ petition under appeal was not pending on 1st February, 1977, the appointed day, to which reference was made under section 58 (1). When sub-section (2) of section 58 spoke of every pending petition, we could think of only a petition under Article 226 of the Constitution before the appointed day which was pending before the High Court immediately before that date. The writ petition (in the present case) was not pending on the appointed day and neither sub-section (1) nor sub-section (2) of section 58 would be attracted and naturally Article 226 (3) of the Constitution would also have no application. [*Paras.* 9 *and* 10.]

Ordinarily, the High Court would decline to exercise jurisdiction (under Article 226) when there was an effective alternate remedy. This was apparently not pressed before the learned Judge. It was not considered in the judgment and the matter was dealt with on merits and an elaborate judgment was rendered negativing the relief. For this reason, the High Court should not stultify the appellant by declining jurisdiction under Article 226 of the Constitution at this stage. [*Para.* 10.]

The Judgment under appeal was set aside and it was held that clause 3 (3) of the Import (Control) Order was not applicable to the facts of this case and the order of confiscation passed by the second respondent and the order in appeal confirming that order were unsustainable. [*Para.* 11.]

Case referred to:—

Government of India v. *National Tobacco Company,* (1977) 1 A.P.L.J. 224: (1977) 2 An.W.R. 1: A.I.R. 1977 A.P. 250.

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice S. Mohan dated 22nd September, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6225 of 1975 presented under Article 226 of the Constitution of India to issue a writ of *certiorari,* calling for the records of the first respondent relating to the orders passed by him in Order No. 293 of 1975 dated 17th September, 1975 confirming the order of the 2nd respondent dated 27th March, 1975 in S. I. B. No. 26 of 1974| S. 8|764 of 1974 and quash the said Orders.

S. Balathandapani, for Appellant.

Junior Central Government Standing Counsel, for Respondent.

The Judgment of the Court was delivered by

Govindan Nair, CJ.—In this appeal by a writ petitioner who unsuccessfully sought to quash the orders passed by the first and second respondents, namely, the Central Board of Excise and Customs and the Collector of Customs, Madras, an interesting and somewhat difficult question of interpretation of the provisions of the Imports (Control) Order, 1955 (hereinafter called 'the Order') arises. To be more, specific, the question is whether on the facts of the case, it is clause 3 (3) of the Order that would apply or clause 10-C thereof.

2. The appellant before us is a letter-of-authority holder for a firm to whom licence had been issued, admittedly validly, for the import of photographic films. He opened an irrevocable letter of credit on 11th January, 1974 in favour of the foreign exporter and the goods were despatched on 24th July, 1974 and they arrived at the Port of Madras and a Bill Entry was filed on 18th September, 1974. The description of the goods given in the licence stated:

"Photographic Negatives only as per AM. 74 Policy, and 2. Wood Free Glazed Boards excluding Ivory and Fine Boards as per AM. 74 policy".

We are not concerned in this case with item 2. The approximate value of the goods was mentioned in the licence as Rs. 1,50,053. The licence was dated April-March, 1974 and it was valid for

18 months from the date of issue. The only other condition of the licence which came up for comment and construction is what is mentioned under clause 8 (ii) (*b*), which is as follows:

"..............................

(*b*) This licence is issued subject to the condition that all items of goods imported under it shall be used only in the licence-holder's factory at the address shown in the application against which the licence is issued and for the purpose for which the licence is issued or may be processed in the factory of another manufacturing unit, but no portion thereof shall be sold to any other party or utilized or permitted to be used in any other manner. The goods so processed in another factory shall, however, be utilized in the manufacturing processes undertaken by the licensee. The licensee shall maintain a proper account of consumption and utilization of the goods imported against the licence in the prescribed manner and produce such account to the licensing authority, sponsoring authority, or any other authority concerned, within such time as may be specified by such authority"........

It is also useful to note that clause 8 (i) states specifically that the licence would be subject to the conditions in force relating to the goods covered by the licence, as described in the Import Trade Control Policy Book for the period during which the licence has been issued.

3. The goods in question could be imported only under licence as it fell under Item 303 of Schedule I of the Order. As we indicated earlier, no question of the lack of valid licence arises for consideration in this appeal. Section 3 of the Imports and Exports (Control) Act, 1947, empowers the Central Government by order published in the Official Gazette to make provisions for prohibiting, restricting or otherwise conrolling in all cases or in specified classes of cases, and subject to such exceptions if any as may be made by or under the order (*a*) the import, export, carriage costwise or shipment as ships stores of goods of any specified description; or (*b*) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried. In exercise of the powers conferred by this section, the Order has been issued and clause 3 thereof is in these terms:

"3. *Restriction of Import of certain goods*.—(1) Save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance, with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II.

(2) If, in any case, it is found that the goods imported under a licence do not conform to the description given in the licence or were shipped prior to the date of issue of the licence under which they are claimed to have been imported, then, without prejudice to any action that may be taken against the licensee under the Customs Act (LII of 1962), in respect of the said importation, the licence may be treated as having been utilised for importing the said goods.

(3) If, in any case, it is found that the goods imported under a licence do not conform in every respect,—

(i) to the description or value of the goods as contained in the licence; or

(ii) to the other conditions relating to such goods, as contained in, or applicable to, the licence,

the import of such goods shall be deemed to be prohibited".

Clause 10-C of the Order reads as follows:—

"(1) Where, on the importation of any goods or at any time thereafter, the Chief Controller of Imports and Exports is satisfied, after giving a reasonable opportunity to the licensee of being heard in the matter, that such

goods cannot be utilised for the purpose for which they were imported he may by order, direct the licensee or any other person, having possession or control of such goods to sell such goods to such person within such time, at such price and in such manner as may be specified in the direction.

(2) The price that may be specified under sub-clause (1) shall be the aggregate of the landed cost of the goods, clearing and transportation charges and such other incidental charges incurred in relation thereto as are considered reasonable in the circumstances of the case by the Chief Controller of Imports and Exports.

(2-A) Where goods are imported through the State Trading Corporation of India, the Minerals and Metals Trading Corporation of India or other similar institutions or agencies owned or controlled by the Government or any other recognised agency, and such goods are allotted to any person, an opportunity of being heard in the matter shall be given to such person also.

(3) The licensee or the person to whom any direction has been made under sub-clause (1) shall be bound to comply with such direction".

4. The condition in clause 8 (*ii*) (*b*), as we have extracted above, had imposed an obligation on the licensee to utilise the goods imported in the factory of the licensee specifically for the manufacturing process carried out by it. The licensee was Messrs. East Coast Sea Foods Corporation. It had refrigeration unit and also a Printing Press. Even before the goods arrived in the Port of Madras, the licensee had sold the freezing plant, and after the arrival of the goods, they had also sold the Printing Press. The Customs authorities got information about these acts of the licensee. Thereupon, they came to the conclusion that the licensee was not in a position to comply with the conditions of the licence and took the view that section 111 (*d*) of the Customs Act read with clause 3 (3) of the Order would enable them to confiscate the goods that had been imported by the licensee with the aid of the letter-of-authority holder who had advanced moneys necessary for the import. Section 111 (*d*) of the Customs Act reads thus:

"The following goods brought from a place outside India shall be liable to confiscation:—

....

(*d*) any goods which are imported or attempted to be imported or are brought within the Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

For the 'prohibition' which is a necessary ingredient of the section which we have just now extracted, reliance has been placed on clause 3 (3) of the Order which we have already extracted earlier in this judgment. We may also refer to the definitions of the terms "import" and "India" in section 2 (23) and section 2 (27) respectively of the Customs Act, 1962:

"(23) 'import', with its grammatical variations and cognate expressions; means bring into India from a place outside India;

(27) 'India' includes the territorial waters of India."

5. A glance at clauses 3 (3) and 10-C of the Order would make it evident that the authority who has to take action under clauses 3 (3) and 10-C are different and they would be acting under different provisions contained in different statutes; and the action under clause 10-C also, in accordance with the policy laid down by virtue of the conditions of the licence itself, would be a part of the terms on which import has been permitted.

6. On the facts that we have stated above and the statutory provisions which we have adverted to, it was contended on behalf of counsel for the appellant that clause 3 (3) will have no application. He elaborated on it by stating that the condition in so far as it insists that the

goods must conform to the description and value as stated in clause 3 (3) (*i*) gives a key in understanding the more widely worded clause 3 (3) (*ii*) which speaks of the other conditions relating to such goods as contained in or applicable to the licence. His submission was that this clause would apply only to such conditions in the licence as could be reasonably related to the physical features, the description and the value of the goods. The second submission in regard to the interpretation to be placed on this clause was that the condition in clause 8 (*ii*) (*b*) in the licence would be attracted normally only in the case of an act or omission of an importer after the import had been completed. It was submitted that the clause must not be read with reference to the facts of a particular case but must be read according to its tenor, so that its applicability to all types of cases could be defined or laid down. It was so submitted because the licensee had by its act of selling the freezing plant and also the Printing Press later, and in view of its apparently difficult financial condition, known or taken to be incapable of fulfilling the condition in clause 8 (*ii*) (*b*) of the licence by the Customs authorities. The argument of counsel was that assuming the inference drawn by the authorities is a correct one, even so the action under clause 3 (3) by the Customs for the confiscation of the goods could not have been resorted to because the clause itself was not applicable for what counsel called, the violation of a "post-importation condition".

7. As a result of the discussions at the bar it became evident that it is difficult by interpreting clause 3 (3) alone to come to the conclusion that the clause will attract only such conditions in the licence attributable to the physical features or value of the goods. In fact, counsel himself mentioned that a licence may provide that the import must be from hard currency countries alone. This has no reference directly to the nature or quality of the goods and any violation of that condition would be a violation which would attract clause 3 (3) (*i*). If the goods were imported from a soft currency area, clause 3 (3) would be attracted and action under that clause would be possible. We shall guard ourselves by stating that we do not wish to express any final opinion in this matter as we think that the correct approach to understand the scope and effect of clause 3 (3) is by reading clause 3 (3) with clause 10-C and by attempting a harmonious construction of the two clauses so that both the clauses may co-exist and one does not infringe one the other or create conflict in their applications. In this regard, we must also refer to paragraph 94 (1) of Chapter IV as well as paragraph 275 (2) of Chapter XIII in the Hand-book. Those paragraphs are in these terms:

> "94. (1) Where, after importing goods against an actual user's licence, the actual user-licensee finds that, for any reasons, he is not in a position to utilise the goods in accordance with the conditions of the licence under which the goods were imported, he should find another actual user and transfer the goods to the latter with the permission of the licensing authority who had issued the licence. The buyer of the goods in such cases should be an actual user requiring the goods in question for use in the industrial unit."

> "275 (2). If for any reason the licensee has not been able to take delivery of the imported goods from the holder of the letter of authority and it is satisfied that the goods, in question, will not serve the purpose for which the import was allowed, it may initiate action in respect of such goods under clause 10-C of the Imports (Control) Order, 1955, dated 7th December, 1965 as amended."

When we read clause 10-C along with paragraphs 94 (1) and 275 (2) of the Hand Book of Import Policy, which are not statutory provisions, but which enunciate the basic policy of the Government under which, and subject to which alone, import in permitted—(We notice that these policies are made conditions of the licence) there can be little doubt that an inability of the licensee to use the im-

ported articles will attract clause 10-C, and action under that clause cannot result in the confiscation of the goods. On the other hand, the goods can only be directed to be sold at a specified price which should cover the c.i.f. value of the imported goods, customs duty paid, landing and clearing charges paid, transportation charges paid from the customs port to the factory|godown of the seller; and other reasonable incidental charges incurred in relation to the imported goods in question. Even in the case of a letter of authority holder, the benefit of proceeding under clause 10-C of the order is provided by paragraph 275 (2) and under clause 10-C there is a statutory provision that the price that may be specified under sub-clause (1) shall be the aggregate of the landed cost of the goods, clearing and transportation charges and such other incidental charges incurred in relation thereto as are considered reasonable in the circumstances of the case by the Chief Controller of Imports and Exports. The provision in this regard relating to non-compliance of the conditions that the goods must be used for the purpose for which they were allowed to be imported by either attempting to sell the imported goods, or arising from incapacity under circumstances beyond the control of the licensee to utilise the imported goods for the purpose for which the import licence was granted is visited only with the consequences of goods being taken from the holder of the letter of authority and directed to be sold to a specified individual at a specified price which would guarantee to the licence-holder or the holder of the letter of authority at least the costs that are incurred in importing the goods. This provision is so widely different from the confiscatory provision which is attracted by clause 3 (3) that it is necessary to say clearly under what circumstances the latter would apply and as to when resort can be had to clause 3 (3). It cannot be that one or the other can be applied indiscriminately either according to the whims of the officers concerned or according to the accidental circumstances of early information which the Customs authorities might have had that a licensee was not in a position to use the goods for the purpose for which they had been imported, as in the case before us. We say the 'accidental circumstances' because it is not always that the customs authorities may have knowledge of the conditions or the circumstances of the licensee at the time the goods arrived at the Port, and if the authority acting under clause 10-C had information that the licensee is incapable or utilising the goods for the purpose for which it is allowed to be imported, even before the goods crossed the customs barrier, we conceive that he is perfectly entitled to pass an order under clause 10-C and direct that the goods be sold to a specified person for a specified price. The question that would arise in such circumstances is whether if an order had been passed by the authority entitled to act under clause 10-C, the Customs authorities could nevertheless, ignoring such an order, confiscate the goods for the violation of the condition for which specific provision is made in clause 10-C. If the customs can override the order of the authority acting under clause 10-C, the provision in clause 10-C will become otiose and will not be applicable. Such inconsistent and inconceivable variations and consequences which result from no fault or omission or act of the licensee cannot be the basis for interpreting the provisions which are patently different one from the other. It is in such circumstances that recourse has to be had to the rule of harmonious construction. We will have to say in what circumstances each clause would be attracted; one providing for the penal, rather drastic provision of depriving the licensee or the letter of authority-holder of the entire goods and, therefore, putting them to loss in that they will not get even one pie towards its value and the other providing for the more benevolent, and if we may say so, a fair and reasonable method of ensuring that the goods are utilised for the purpose for which they are imported and at the same time also providing that the licensee|letter of authority-holder should receive substantially the expenditure incurred in importing. The two cannot be allowed to be applied to the same set of circumstances or facts. In the light of this position, we have to accept the argu-

ment of counsel for the appellant that when the violation is of a condition in the licence, which would normally be expected to happen after the import is completed as in the case of failure to utilise the goods for the purpose for which they were allowed to be imported, it is only clause 10-C that would apply and not clause 3 (3).

8. When a show cause notice was issued quoting section 111 (*d*) of the Customs Act, 1962 and relying on clause 3 (3) of the Order, objection was taken by the appellant and he invited the attention of the authorities to clause 10-C and claimed that action should be taken under clause 10-C and not under clause 3 (3) of the Order. This was overruled by the first respondent and the attempt of the appellant to get the order reversed in appeal before the Central Board of Revenue also failed. We think that the provisions contained in these two clauses of the Order had not been properly understood and they have not been interpreted in the manner in which they should be interpreted. We have, therefore, no doubt that the orders are erroneous in law and they have serious consequences in that the appellant, the holder of the letter of authority who had expended large sums of moneys to the tune of over Rs. 1,60,000 for getting the goods imported to India had suffered by the order that has been passed. We should, therefore, normally set aside these orders.

9. Counsel for the respondents, however, contended that in view of the provision in section 131 of the Customs Act, 1962, a revision from an order of the appellate authority, namely, the first respondent the Central Board of Excise and Customs under section 128 of the Act being permitted by law, the appellant has other remedy available to him and by virtue of Article 226 (3) read with the provision in section 58 of the Constitution (Forty-second Amendment) Act, 1976, this Court will have to deny any relief to the appellant; and hold that the writ petition itself has abated. This leads us to consider the provision in section 58. It is as follows:—

"58. *Special provisions as to pending petitions under Article* 226.—(1) Notwithstanding anything contained in the Constitution, every petition made under Article 226 of the Constitution before the appointed day and pending before any High Court immediately before that day (such petition being referred to in this section as a pending petition) and any interim order (whether by way of injunctioi or stay or in any other manner) made on, or in any proceeding relating to, such petition before that day shall be dealt with in accordance with the provisions of Article 226 as substituted by section 38.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Article 226 as substituted by section 38 if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay or in any other manner) made on, or in any proceedings relating to, such petition shall stand vacated:

Provided that nothing contained in this sub-section shall affect the right of the petitioner to seek relief under any other law for the time being in force in respect of the matters to which such petition relates and in computing the period of limitation, if any, for seeking such relief, the period during which the proceedings relating to such petition were pending in the High Court shall be excluded.

(3) Every interim order (whether by way of injunction or stay or in any other manner) which was made before the appointed day, on, or in any proceedings relating to, a pending petition not being a pending petition which has abated under sub-section (2) and which is in force on that day, shall, unless before the appointed day copies of such pending petition and of documents in support of the plea for such

interim order had been furnished to the party against whom such interim order was made and an opportunity had been given to such party to be heard in the matter, cease to have effect (if not vacated earlier),—

(*a*) on the expiry of a period of one month from the appointed day, if the copies of such pending petition and the documents in support of the plea for the interim order are not furnished to such party before the expiry of the said period of one month; or

(*b*) on the expiry of a period of four months from the appointed day, if the copies referred to in clause (*a*) have been furnished to such party within the period of one month referred to in that clause but such party has not been given an opportunity to be heard in the matter before the expiry of the said period of four months.

"(4) Notwithstanding anything contained in sub-section (3), every interim order (whether by way of injunction or stay or in any other manner) which was made before the appointed day on or in any proceedings relating to a pending petition not being a pending petition which has abated under sub-section (2), and which is in force on that day, shall, if such order has the effect of delaying any inquiry into a matter of public importance or any investigation or inquiry into an offence punishable with imprisonment or any action for the execution of any work or project of public utility, or the acquisition of any property for such execution, by the Government, or any corporation owned or controlled by the Government, stand vacated.

Explanation.—In this section, "appointed day" means the date on which section 38 comes into force".

There are two sub-sections in section 58 and the first sub-section clearly states what is meant by a pending writ petition. The writ petition must be pending on the appointed day *i.e.*, 1st February, 1977. Both the sub-sections refer only to writ petitions and not to writ appeals. The question is whether a writ petition that had been disposed of before 1st February, 1977 could be stated to be pending on the appointed day. We have no hesitation in saying that it is impossible to say that the writ petition was pending on the appointed day. The statute had not imported any legal fiction by which it had provided that notwithstanding the dismissal of the writ petition, by virtue of the fact that an appeal had been taken by the writ petitioner, the 'writ petition must be deemed to have been pending on the appointed day. A plain reading, of the sections therefore, obliges us to say that the writ petition under appeal before us was not pending on 1st February, 1977, the appointed day to which reference is made under section 58 (1).

10. Then the question is whether in view of the apparently wider language of section 58 (2), counsel for the respondents could contend that the principle of Article 226 (3) must be applied even in regard to this appeal. Section 58 (1) itself states what is meant by a pending petition. It has been described in detail as "every petition made under Article 226 of the Constitution before the appointed day and pending before any High Court immediately before that day" and after these words occur the words "such petition"; being referred to *in this section* as a pending petition. Therefore, when sub-section (2) of section 58 speaks of every pending petition, we can think of only a petition under Article 226 of the Constitution before the appointed day which was pending before the High Court immediately before that date. As we said, W.P. No. 6225 of 1975, by the judgment under appeal was dismissed on 22nd September, 1976. The writ petition, therefore, was not pending on the appointed day and neither sub-section (1) nor sub-section (2) of section 58, therefore, would be attracted and naturally, Article 226 (3) of the Constitution will also have no application. We are not, therefore able to dispose of the appeal on the preliminary objection, which normally we should have dealt with earlier by stating that the appeal had abated. The view that we have taken in supported by the conclusion reached by a Full Bench decision of the

Andhra Pradesh High Court in *Government of India* v. *National Tobacco Company*[1], where there is an elaborate discussion of various other matters and that Court also came to the conclusion that in regard to a petition that had been dismissed before the appointed day and against the judgment dismissing the petition there was an appeal pending, section 58 will have no application. We prefer to rest our decision exclusively on the interpretation that we place on the wording of the section by giving those words their natural and ordinary meaning which those words convey. It is also significant to note that the section speaks of petitions pending before any "High Court". We can conceive of a petition instituted before the appointed day and disposed of by the High Court pending before the Supreme Court by the time section 58 came into operation. If we apply the theory recommended by counsel on behalf of the respondents that the appeal is a continuation of the writ petition, we suppose, it must extend also the appeals pending before the Supreme Court. But the section certainly will not apply to appeals pending in the Supreme Court because in so many words it states that the petition must be pending in the High Court. This position under the section gives us another clue that the section is not intended to affect appeals taken from the decision in writ petitions disposed of before the appointed day. We, therefore, negative the preliminary objection that by virtue of Article 226 (3), we should decline the exercise of jurisdiction under that Article. There is yet another reason for the conclusion. A point was taken in the counter-affidavit filed before the learned Judge that the remedy under section 131 of the Customs Act was available and this Court should not exercise jurisdiction under Article 226. This objection was taken with reference to the Article as it stood before the amendment was effected by the Forty-second Amendment to the Constitution. Ordinarily, the High Courts would decline to exercise jurisdiction when there is an effective alternate remedy. The objection was, therefore, not without substance, but it was apparently not pressed before the learned Judge. It was not considered in the judgment and the matter was dealt with on the merits and an elaborate judgment was rendered negativing the relief. For this reason also we think that we should not stultify the appellant by declining jurisdiction under Article 226 of the Constitution at this stage.

11. In the light of the above, with great respect to the learned Judge, we have to set aside the judgment under appeal and hold that clause 3 (3) of the Order is not applicable to the facts of this case and that the order of confiscation passed by the second respondent and the order in appeal confirming that order are unsustainable. Accordingly, we set aside the judgment and set aside the orders passed by the first and respondents and set at naught the confiscation.

12. The only remaning question is what should happen to the money that had been held by the first and second respondents on the sale of the goods to the fourth respondent on 4th October, 1973. There was an order in W.M.P. No. 10136 of 1975 that the amount, namely, Rs. 2,60,721 will be held by the first and second respondents to be disbursed in accordance with the directions of this Court. In this connection, we have to refer to the fact that on the 30th of September, 1975, the appellant before us sent a letter by registered post acknowledgment due to the second respondent telling him that the orders of the first and second respondents are being challenged before the High Court in proceedings under Article 226 and requesting the second respondent not to sell the valuable goods that had been imported. This letter was received by the second respondent on 3rd October, 1975. Ignoring this request completely, he sold the goods on the 4th October and the order passed by this Court on 7th October, 1975 in W.M.P. No. 8905 of 1975 not to sell the goods became a futile order. That is why it was stated in the order in W.M.P. No. 10136 of 1975 that the

1. (1977) 1 A.P.L.J. 224: (1977) 2 An.W.R. 1: A.I.R. 1977 A.P. 250.

amount will be held for disbursement in accordance with the directions of this Court.

13. The sum fetched by sale to the fourth respondent as we said is Rs. 2,60,721. The c.i.f. value that is mentioned before us is over Rs. 1,60,000. Counsel for respondents states that the customs duty payable is 120 per cent. on that value. If the customs duty is taken from Rs. 2,60,721, the appellant, the letter-of-authority holder who made the money available for import, will certainly not get the c.i.f. value of the goods. This petition had resulted by the hasty action taken under clause 3 (3) of the Order, and therefore, if any one should suffer, it must be the respondents. We, therefore, direct that out of the sum of Rs. 2,60,721 held by the first and second respondents in accordance with the order passed by this Court in W. M.P. No. 10136 of 1975, the c.i.f. value of the goods and any other expenses which could fall under paragraph 94 of the policy and clause 10-C (2) of the Order will be paid by the first and second respondents to the appellant. The balance amount may be taken by the Customs authorities towards the customs duty payable on the import.

14. We dispose of the appeal on the above terms. We direct the parties to bear their own costs throughout in these proceedings because as we prefaced the judgment, the question arising for decision was somewhat a difficult one and it was not contended that there was any *mala fide* action or even any action without any *bona fides*.

S.J. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*V. Sethuraman and V. Balasubrahmanyan, JJ.*

G. Duraikannu .. *Appellant**

v.

A. Natesa Pillai and others .. *Respondents.*

(A) *Hindu Law—Trust—Dedication of properties—Absolute or partial—Test.*

(B) *Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 63—Deputy Commissioner—Enquiry regarding religious or secular character of the endowment—Endowment for support of several temples—Use of the word* "ubayam"*—Specific religious endowment created—Not a private endowment — Rsligious charity, definition.*

(C) *Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), section 70—Right of suit within 90 days to set aside an order—Period how computed—Filing of copy application—Effect—Date of the receipt of the order alone relevant.*

(D) *Deed—Construction.*

To ascertain whether a dedication is partial or absolute, the instrument as a whole has to be taken. The intention of the author of the document has to be gathered and that has to be done only from the words used. Where the document speaks only of the income, the intention has to be ascertained from the disposal of the income. If for the maintenance of public charity a minor portion of the income is required to be used and a substantial surplus is left in the hands of the manager for his own private purposes, there would not be a complete dedication. But if the charity is given a substantial part of the income, then, the dedication would be a complete one. The document in the instant case did not contemplate any surplus being left in the hands of the

*A.S. No. 348 of 1974. 7th October, 1977.

person-in-charge of the properties. The purpose contemplated was that the charity was to be done in accordance with the status of the family. The expenditure was thus bound to be elastic, so that when the income increases, the obligation to pay for the charity would also expand. It is not as if any specific amount alone was contemplated to be spent so as to leave a balance. Further there are no words of disposal with reference to the balance, if any, of the income from the said properties. It is, therefore, manifest that the dedication for these purposes was absolute and not partial. [*Para*. 13.]

Section 63 of the Madras Hindu Religious and Charitable Endowments Act confers on the Deputy Commissioner power to enquire and decide the question whether any institution or endowment is wholly or partly of a religious or secular character; and whether any property or money was given wholly or partly for religious or secular use. See clause (*f*). Clause (*g*) contemplates determination by the Commissioner of the amount to be allocated to religious uses where any property or money has been given for the support of an institution which is partly of a religious and partly of a secular character, or the performance of any service or charity connected with such an institution or the performance of a charity which is partly of a deligious and partly of a secular character or where any property or money was appropriated partly to religious and partly to secular uses. 'Religious charity' is defined in section 6 (16) as meaning a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with a math or temple or not. "Religious endowment" or "endowment" means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof; but does not include gifts of property made as personal gifts to the *archaka*, service-holder or other employee of a religious institution. See clause (17) of section 6. Section 6 (19) defines "specific endowment" as meaning any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity. In the instant case there was an endowment for the support of the several temples mentioned in the documents. The word *'ubhayam'* used therein itself goes to show, that there was an endowment to a temple for a religious purpose. Therefore, the provisions of section 63 were rightly attracted to the case. The decisions of the High Court were clear on the point that there can be a religious charity or religious endowment in respect of something to be done at the time of a festival in a temple when the deity is taken out. If in view of the use of the expression *'ubhayam'* the properties are taken as a gift to the temple, then there can be no question of any vagueness of purpose for which the properties are dedicated.

[*Paras*. 14 *and* 15.]

Section 70 of the Madras Hindu Religious and Charitable Endowment Act provides that any party aggrieved by an order passed by the Commissioner, among others under section 63, which is the only relevant provision for the present case, may within ninety days from the date of the receipt of such order by him institute a suit in the Court against such order. The period of ninety days commences from the date of the receipt of the order. In the present case even the dismissal of the appeal had not been communicated at the time when the copy application was made. Merely because the plaintiff filed an application for the copy of the order, it does not mean that he had received the order. The filing of the copy application may indicate knowledge of the order but knowledge is not the criterion under section 70.

[*Para*. 6.]

Held, that the suit was not barred by limitation and there was an endowment to a temple for a religious purpose and the provisions of section 63 were rightly attracted.

Cases referred to:—

Thiruvengadaswami Iyengar v. *Commissioner, Hindu Religious and Charitable Endowment*, (1958) 1 M. L. J. 285: I.L.R. (1958) Mad. 662: (1958) L.W. 181; *Deoki Nandan* v. *Murlidhar*, 1956 S. C. R. 756: (1957) 1 M.L.J. (S.C.) 28: (1957) 1 An.W.R. (S.C.) 28: 1957 S.C.J. 75: A.I.R. 1957 S. C. 133; *Runchordas Vandravandas* v. *Parbati Bai*, L.R. (1899) 26 I.A. 71: 1 Bom.L.R. 607: I.L.R. 23 Bom. 725; *Parthasarathi Pillai* v. *Thiru Vengada*, (1907) I.L.R. 30 Mad. 340: 17 M.L.J. 379; *Dasaratha Rami Reddy* v. *Subba Rao*, 1957 S.C.R. 1122: (1957) 2 M.L.J. (S.C.) 175: (1957) 2 An.W.R. (S.C.) 175: 1957 S.C.J. 835: A.I.R. 1957 S.C. 797; *Vasudeva Rao* v. *C. R. Rangai Gounder*, (1951) 1 M.L.J. 588: 64 L.W. 574: A.I.R. 1952 Mad. 650.

Appeal against the decree of the Court of the Subordinate Judge, Mayuram, dated 31st July, 1973 and made in Original Suit No. 81 of 1970.

K. S. Bhakthavatsalam, R. Gandhi and *S. Jagadeesan*, for Appellant.

R. Sundaralingam and *R. Ramakrishnababu*, for 1st Respondent.

The Additional Government Pleader, for 2nd and 3rd Respondents.

The Judgment of the Court was delivered by

Sethuraman, J.—The plaintiff's adopted son in O.S. No. 81 of 1970 on the file of the Court of the Subordinate Judge of Mayuram is the appellant. One Ramaswami Pillai and a son of his brother Kolandavelayutham Pillai effected a partition between themselves on 26th July, 1969. In the said partition certain lands were kept out of division and reserved for certain religious purposes to be set out presently. The area so reserved was of the extent of 38 acres of lands situated in some villages in Thanjavur District. By a subsequent deed, dated 22nd September, 1969, there was same modification of the purpose for which the properties were reserved and a part of the properties originally shown in the document was also excluded. Ramaswami Pillai was to be in charge of doing the obligations contemplated by the said deed. The properties subsequently stood recorded in the name of the successors of the said Ramaswami Pillai. *Suo motu* proceedings under section 63 (*f*) and (*g*) of the Madras Hindu Religious and Charitable Endowments Act, 1959, were started by the Deputy Commissioner of the Hindu Religious and Charitable Endowments, Thanjavur, in O.A. No. 5 of 1965 against the plaintiff, who was at the relevant time in charge of the properties. The plaintiff filed a counter objecting to the said proceedings and pointing out that the properties were not specific endowments for a religious purpose. By an order dated 22nd November, 1966 the Deputy Commissioner held that the properties constituted a specific endowment, that the charities were of a religious nature coming within the scope of section 63 (*f*) and (*g*) of the Act and that there was no question of the facts of apportionment between the religious charities and secular charities as claimed by the plaintiff. The plaintiff thereafter filed an appeal to the Commissiioner, Hindu Religious and Charitable Endowments in Appeal No. 14 of 1967. By his order dated 12th January, 1970 he upheld the decision of the Deputy Commissioner. The plaintiff issued the requisite notice under section 80 of the Code of Civil Procedure to the Commissioner and the Deputy Commissioner, who are the defendants in the present suit informing them that a suit to set aside the orders passed by them would be filed under section 70 of the Act. The defendants pointed out in their reply that the suit would be barred by limitation. The plaintiff thereafter filed the present suit for setting aside the orders passed by the defendants and for a declaration that the suit properties were not trust properties and did not constitute a specific endowment, but only private properties subject to the liability for performing certain *"ubhayam"*.

2. The defendants contested the suit stating that the orders passed by them were legal and valid and could not be

set aside. They pleaded also that the suit was barred by limitation. They took up another contention in the additional written statement that the document dated 22nd September, 1869 was invalid.

3. The learned Subordinate Judge framed the appropriate issues, the main ones being whether the suit properties were not specific religious endowments and whether the suit was barred by limitation. The learned Subordinate Judge held that the suit was not barred by time, but that the deeds created a specific religious endowment and not a private endowment as contended for the plaintiff. It is this judgment and decree that are now challenged by the plaintiff's son.

4. The learned counsel for the appellant took before us only one point *viz.*, that there was no specific religious endowment which came within the scope of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1969. The learned counsel for the respondents argued that the suit was barred by time. We shall first consider the question of limitation. The order of the Commissioner is marked as Exhibit A-2 which is dated 12th January, 1970. A copy of the order communicated to the plaintiff was signed on 15th April, 1970 and it appears to have been received on 18th April, 1970. The order reads as follows:—

5. "The appeal be and is hereby dismissed". There was no annexure giving the reasons for the order. On 18th February, 1970 the plaintiff filed a copy application. The stamps were called on 8th May, 1970. The stamps were deposited on 13th May, 1970 and the copy was ready on 28th May, 1970. The suit was filed on 24th August, 1970. Section 70 of the Act provides that any party aggrieved by an order passed by the Commissioner, among others under section 63, which is the only relevant provision for our present case, may within ninety days from the date of the receipt of such order by him, institute a suit in the Court against such order. The period of ninety days commences from the date of the receipt of the order. As we have pointed out, the order stating that the appeal was dismissed, was received on 18th April, 1970. In *Thiruvengadaswami Iyengar* v. *Commissioner, Hindu Religious and Charitable Endowments*[1], Balakrishna Ayyar, J., pointed out that where the Commissioner passed an order merely stating that the appeal was dismissed and called the reasons for the order as an Annexure, the Annexure would be an integral part of the order and that the date of the receipt of the order contemplated by the Act was the date of the receipt of the entire order including the Annexure and not merely the last sentence of the order stating that the appeal was dismissed. He pointed out that the aggrieved party had a right to file a suit within ninety days of his obtaining a copy of the entire order if the same was not communicated to him. There was no dispute that if the receipt of the entire order alone is relevant, then the suit is within time. The learned counsel for the respondents submitted that the plaintiff was aware of the order that was passed even in February, 1970, and that is how the plaintiff filed the copy application on 18th February, 1970. It was, therefore, submitted that we have to reckon the period of limitation from that date.

6. There is no substance in this objection. The section contemplates a suit being instituted within a period of ninety days from the date of the receipt of such order by the plaintiff. In the present case even the dismissal of the appeal had not been communicated at the time when the copy application was made. Merely because the plaintiff filed an application for the copy of the order, it does not mean that he had received the order. The filing of the copy application may indicate knowledge of the order but knowledge is not the criterion under section 70. We, therefore, held that the suit was not barred by limitation.

7. The only point that now survives for consideration is whether there was a religious endowment created under the

1. (1958) 1 M.L.J. 285: I.L.R. (1958) Mad. 662: (1958) L.W. 181.

document dated 26th July, 1969, subsequently modified by a document dated 22nd September, 1969. The document dated 26th July, 1869 which has been marked as Exhibit A-3 is in Tamil. This document is between Ramaswami Pillai and his nephew Namasivaya through his elder brother, Kolandavelayutham Pillai, who had passed away by then. It recites that the family was indebted at the time when Namasivaya, the father of Ramaswami, died and that Kolandavelayutham Pillai had by his conduct increased the indebtedness. It was Ramaswami who by his own exertions, redeemed the family from its indebtedness. It further recites that the two parties to the document, out of their free will, released in favour of Ramaswami Pillai certain properties in a village called 'Vadavar'. Thereafter the document states thus:

"மிகுதியான குடும்ப பொது சொத்தில் ஷை கோவில் பத்து கிராமத்தில் நம்மில் ஷை ராமசாமி பிள்ளையால் இதுவரையில் பெலமாய் திருப்பணி வேலை நடத்தி வருகிற ஸ்ரீகைலாஸநாதஸ்வாமி கோவில் பூஜை நெய்வேத்தியத்துக்காகவும் இனி நடத்த வேண்டிய பாக்கி திருப்பணி வேலைக்காகவும் பழனி ஸ்ரீ சுப்பிரமணிய சுவாமிக்கு இதுவரை நடந்துவரும் உபயப்படி இனி நடந்து வரவேண்டியதற்காகவும் அப்படியே ஸ்ரீவாஞ்சியம் ஸ்ரீ வாஞ்சியநாதஸ்வாமி உபயத்துக்கும் நாச்சியார்குடி ஸ்ரீ ஸ்ரீனிவாச பெருமாள் உபயத்துக்கும் சிதம்பரம் ஸ்ரீ சபா நடேசுவரஸ்வாமியுடைய உபயத்துக்கும் நம்முடைய குடும்ப கௌரவத்துக்கு தக்கபடி இதுவரை சில்லரையாய் நடந்துவரும் தர்மத்தை இனி குறைவின்றி நடத்திவரவும் மேல்கண்ட தர்மங்களின் உபயத்துக்காக மேல்கண்ட வேத்திருவிடச்சேரி கிராமத்தில் குடும்ப பொதுவிலிருக்கிற நஞ்சை புஞ்சை வகையறு குடும்ப பொதுவில் ஷை தர்மங்களின் உபயத்துக்காக வைத்திருப்பதை அதன் விர்த்தியாம்சத்தைக் கொண்டு நம்மில் ராமசாமிபிள்ளை ஷை தர்ம பரிபாலனத்தை செய்து வருகிறது.

இதுகளை தவிர அடியில் கண்டபடி அவரவர்கள் பாகத்துக்கு கிடைத்த கிராமங்களிலுள்ள சொத்துக்களை அவரவர்கள் கைகொண்டு தானாதி வினிமய விக்கிரயங்களுக்கு யோக்கியமாக ஆச்சந்திரார்க்க ஸ்தாயியாய் அவரவர்கள் அனுபவித்துக் கொள்ளுகிறது"

Freely translated it mentions that out of the rest of the properties which were not covered by the release in favour of Ramaswami, the family would, in accordance with the status of the family, perform the charities done miscellaneously without any diminution and that the properties situated in Thiruvadacharry etc., were kept for the purpose of doing the *"Dharmam* or *ubhayam"* out of the income from the said properties. Ramaswami was to be in charge of the said properties. The religious obligations contemplated by the document are: (1) finishing the repair of the temple of Kailasanathaswami in the ancestral village of the parties and for *Puja* and *Naivedya* for one *kala puja* of the said deity; (2) for doing in the same manner as was done upto that date the *'Ubhayam'* for Subramaniaswami of Palani; (3) for doing similar *'Ubhayam'* to Vanchinathaswami; (4) for doing *'Ubhayam'* for Sri Srinivasa Perumal of Nachiyarkudi; and (5) for the *'Ubhayam'* of Sri Saba Nateswaraswami at Chidambaram. Except in the case of the repairs or reconstructions of the temple in the village and for doing the one *kala puja* in the temple in the ancestral village, the nature of *"Ubhayam"* in Palani, Srivanchiyam, Nachiyarkudi and Chidambaram is not specifically described. In the document dated 22nd September, 1869, the only changes made are the removal of *"Ubhayam"* of Sri Srinivasa Perumal of Nachiyarkudi or Nachiyarkoil and the removal of certain lands which were originally kept for the purpose of all these obligations in Exhibit A-3. As in the Court below there was some discussion about the validity of the document dated 22nd September, 1869, marked as Exhibit A-4, for our present purpose, it is unnecessary to go into the validity of the said document. If the said document is invalid, then it would be enough to concentrate on Exhibit A-3. Even if the said document is valid, it would only have the effect of removal of one of the objects for which the properties were reserved and also for removal of

certain of the properties from our consideration. But the nature of the jurisdiction of the Deputy Commissioner or the Commissioner, as the case may be, is unaffected by the presence of that particular object in favour of Srinivasa Perumal of Nachiyarkoil or by the presence of that particular property, which was originally kept apart.

8. Mr. T. R. Ramachandran, the learned counsel for the appellant vehemently argued that there was no trust at all and that the properties were merely held subject to a liability for meeting certain obligations. In his submission the properties continued to remain as the private properties of the family. He stated also that there was only a private trust, which did not come within the scope of the Tamil Nadu Hindu Religious and Charitable Endowments Act.

9. We may now examine the question whether this is a public or private trust. In the Hindu Law of Religious and Charitable Trust (Tagore Law Lectures) by B. K. Mukherjea, Second Edition, by Justice T. L. Venkatarama Aiyar at page 50, this distinction has been brought out:

> "The line of distinction between a public purpose and which is not public is extremely thin, and is practically incapable of definition. Tudor in his 'Charities' thus sums up the principles deducible from the cases on the subject (Tudor on Charities, P. 12, 5th Edn.):
>
> If the intention of the donor is merely to benefit specific individuals, the gift is not charitable, even though the motive of the gift may be to relieve their poverty or accomplish some other purpose with reference to those particular individuals which would be charitable if not so confined; on the other hand, if the donor's object is to accomplish the abstract purpose of relieving poverty, advancing education or religion or other purpose charitable within the meaning of the Statute of Elizabeth, without giving to any particular individuals the right to claim the funds, the gift is charitable."

The principle set out by Tudor holds good in this country also, as may be seen from the following passage in *Deoki Nandan* v. *Murlidhar*[1], where the Supreme Court observed as follows:

> "The distinction between a private and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

10. At page 167 of Mukherjea's Hindu Law of Religious and Charitable Trust, it is stated as follows:

> "By public trust it must be understood such as are constituted for the benefit either of the public at large, or of some considerable portion of it, answering a particular description, while private trusts concern only individuals or families. A private trust providing for the material or spiritual benefit of individuals and families could not rank as a charitable trust in English law which must be public in its character. In Hindu law, however, it is competent for a donor to create a religious trust, the benefit of which is confined to the members of a particular family or the disciples of a particular religious preceptor."

11. In the present case the objects conceived are all worships in a temple. Mr. Ramachandran had, during the arguments, to admit a public religious purpose in the objects in respect of Kailasanathaswami temple in the ancestral village of the parties. The *Thirupani* may not be a recurring obligation as it was intended only to complete what had been left incomplete by Ramaswami, but that is irrelevant. A single *kala puja* had to be done in the temple and these two purposes in relation to the local temple are admitted to be public religious purposes. It is only with respect to the worship in the other temples that he stated that the

1. 1957 S.C.J. 75 : 1956 S.C.R. 756 : (1957) 1 M.L.J. (S.C.) 28 : (1957) 1 An. W.R. (S.C.) 28 : A.I.R. 1957 S.C. 133.

purpose was a private one. For instance as far as Palani temple was concerned the evidence of Doraikkannu (P.W. 1) aged about 75, was that they were taking only a *kavadi* and were performing an *Abishekam* on the Thaipusam day there. The contention of the learned counsel was that this was only a private or individual purpose and did not have anything to do with the public. The document Exhibit A-3 contemplates the performance of the *'Ubhayam'* or *'Dharmam'* (these are the expressions used in the document). They have to be done in the same manner as was being done prior to the document. There is no evidence in the present case about the manner in which it was being done prior to the document, during the lifetime of Ramaswami. It may be that subsequent to Ramaswamy's death the family was content with merely offering a *kavadi* and doing an *Ahishekam* in the Palani temple. The omission to do the charity in the manner contemplated by the document would not in any manner clothe the parties with a vested right to do the same only in the manner in which it was being done as claimed by P.W. 1. The word *'Ubhayam'* means gift to a temple or a monastery. *See* Tamil Lexicon, Vol. I, page 425 published under the authority of the University of Madras. This meaning is treated to the South Indian inscriptions. Thus, the word *'Ubhayam'* has got a historical and religious association as a gift to a temple. We have to take it, on a construction of the document, having regard to the use of the word *'Ubhayam'* that the gift was in favour of that particular temple.

12. The learned counsel for the appellant contended that the whole terms of the document are so vague that it cannot be taken as a dedication for any particular religious or charitable purpose so as to come within the scope of the Act. The learned counsel pointed out that the word *'Dharmam'* is one of vague and indefinite import and for this purpose he relied on a decision of the Privy Council in *Runchordas Vandravandas* v. *Parbati Bai*[1]. In that case the Judicial Committee referred to Wilson's Dictionary, where *'Dharmam'* was defined to mean law, virtue, legal or moral duty and it was held that these objects were too vague and uncertain to be administered by any Court. In Mukherjea's Hindu Law of Religious and Charitable Trust at page 105 in noticing this case it is observed as follows:

> "With all respect to the Judicial Committee of the Privy Council, it may be pointed out, that the dictionary meaning of the word "charity" is equally wide and indefinite, but what the English Judges proceed upon, is not the dictionary meaning of the word but the technical meaning that it has come to acquire on the basis of the Statute of Elizabeth".

Reference was also made to a decision of Subramania Iyer, J., in *Parthasarathi Pillai* v. *Thiru Vengada*[1], which has been considered to be the correct exposition of the word *'Dharmam'*. The learned Judge Subramania Aiyar, J., took *'Dharmam'* as meaning *Istha* and *Purtta*. For our present purpose it is unnecessary to go into the concept of the word *'Dharmam'* in the present case and examine how far the decision of the Privy Council is to be followed. In the present document the word *'Dharmam'* is used in association with the word *'Ubhayam'* and as the meaning of *'Ubhayam'* is clear we need not tarry to consider the question whether the word *'Dharmam'* is vague or not. The document taken as a whole clearly shows that the gift was with reference to the various objects of charity conducted in respect of the temples of Palani, Srivanchiyam, Nachiyarkudi and Chidambaram.

13. Another manner in which the learned counsel for the appellant wanted to show that the document created only an obligation to do certain acts in the said temples without any specific endowment being created therefor was that the income that would be consumed by these purposes would be very little compared to the extent of the income available out of the lands. In other words, the attempt of the learned counsel was to bring

1. (1899) L.R. 26 I.A. 71 ; 1 Bom. L.R. 607: I.L.R. 23 Bom. 725.

1. (1907) I.L.R. 30 Mad. 340: 17 M.L.J. 379.

it within the class of cases where the dedication was held to be partial. The distinction between an absolute and partial debutter was explained by Mukherjea in his Lectures as follows at page 157:

> "Where the dedication made by a settlor in favour of an idol covers the entire beneficial interest which he had in the property, the debutter is an absolute or complete debutter. Where however some proprietary or pecuniary right or interest in the property is either undisposed of or is reserved for the settlor's family or relations, a case of partial dedication arises. In a partial dedication the deity does not become the owner of the dedicated property but is in the position of a charge-holder in respect of the same. A charge is created on the property and there is an obligation on the holder to apply a portion of the income for the religious purposes indicated by the settlor. The property does not became extra-commercium like debutter property, strictly speaking so called, but is alienable subject to the charge and descends according to the ordinary rules of inheritance. It can be attached and sold in execution of a decree against the holder. Whoever gets the property however takes it burdened with the charge or religious trust."

The learned editor, Mr. T. L. Venkatarama Aiyar in his second edition has given reference to the decision of the Supreme Court in *Dasaratha Rami Reddy* v. *Subbarao*[1]. In that case it was pointed out at page 177 as follows:

> "The principles of Hindu Law applicable to the consideration of questions of dedication of property to charity are well-settled. Dedication to charity need not necessarily be by instrument or grant. It can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show the extinction of the private secular character of the property and its complete dedication to charity. On the other hand, in many cases Courts have to deal with grants or gifts showing dedication of property to charity. Now it is clear that dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character. Whether or not dedication is complete would naturally be a question of fact to be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word "trust" or "trustee" is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter. Is the private title over the property intended to be completely extinguished? Is the title in regard to the property intended to be completely transferred to the charity? The answer to these questions can be found not by concentrating on the significance of the use of the word "trustee" or "trust" alone but by 'gathering' the true intent of the document considered as a whole. In the cases where documents purport to dedicate property in favour of public charity, provision is made for the maintenance of the worshipper who may be a member of the family of the original owner of the property himself and in such cases the question often arises whether the provision for the maintenance of the manager or the worshipper from the income of the property indicates an intention that the property should retain its original character and should merely be burdened with an obligation in favour of the charity. If the income of the property is substantially intended to be used for the purpose of

1. 1957 S.C.J. 835: 1957 S.C.R. 1122: (1957) 2 M.L.J. (S.C.) 175: (1957) 2 An.W.R. (S.C.) 175: A.I.R. 1957 S.C. 797.

the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication. It is naturally difficult to lay down a general rule for the solution of the problem. Each case must be considered on its facts and the intention of the parties must be determined on reading the document as a whole."

The legal position "that emerges is that to ascertain whether the dedication is partial or absolute, we have to take the instrument as a whole. The intention of the author of the document has to be gathered and that has to be done only from the words used. Where, as here, the document speaks only of the income, the intention has to be ascertained from the disposal of the income. If for the maintenance of public charity, a minor portion of the income is required to be used and substantial surplus is left in the hands of the manager for his own private purposes, there would *not* be a complete dedication. But if the charity is given a substantial part of the income, then, the dedication would be a complete one. The document before us does not contemplate any surplus being left in the hands of the person in charge of the properties. The purpose contemplated is that the charity is to be done in accordance with the status of the family. The expenditure is thus bound to be elastic, so that when the income increases, the obligation to pay for the charity also expands. It is not as if any specific amount alone was contemplated to be spent so as to leave a balance. Further there are no words of disposal with reference to the balance, if any, of the income from the said properties. It is, therefore, manifest that the reservation for these purposes was absolute and not partial.

14. Section 63 confers on the Deputy Commissioner power to enquire and decide the question whether any institution or endowment is wholly or partly of a religious of secular character; and whether any property or money was given wholly or partly for religious or secular uses. See clause *(f)*. Clause *(g)* contemplates determination by the Commmissioner of the amount to be allocated to religious uses where any property or money has been given for the support of an institution which is partly of a religious and partly of a secular character, or the performance of any service or charity connected with such an institution or the performance of a charity which is partly of a religious and partly of a secular character or where any property or money given was appropriated partly to religious and partly to secular uses. 'Religious charity' is defined in section 6 (16) as meaning a public charity associated with a Hindu festival or observance of a religious character, whether it be connected with a math or temple or not. "Religious endowment" or "endowment" means all property belonging to or given or endowed for the support of maths or temples, or given or endowed for the performance of any service or charity of a public nature connected therewith or of any other religious charity; and includes the institution concerned and also the premises thereof; but does not include gifts of property made as personal gifts to the *archaka,* service-holder or other employee of a "religious institution". See clause (17) of section 6. Section 6 (19) defines "specific endowment" as meaning any property or money endowed for the performance of any specific service or charity in a math or temple, or for the performance of any other religious charity. In this case there is an endowment for the support of the several temples mentioned in Exhibits A-3 and A-4, as the case may be. The word *'Ubhayam'* itself goes to show, as seen already that there was an endowment to a temple for a religious purpose. There-

fore, the provisions of section 63 were rightly attracted to this case.

15. The decisions of this Court are clear on the point that there can be a religious charity or religious endowment in respect of something to be done at the time of a festival in a temple when the deity is taken out. In *Vasudev Rao* v. *C. K. Rangai Gounder*[1], Govinda Menon, J., as he then was, was concerned with the charity by observance of *Skanda Shashti* and *Soorasamhara* festival in Sri Subramaniaswami temple and also for the erection of a Mandapam in front of a house for doing worship to the deity when it was taken out and brought through the street in which the house was located. It was held in that case that there was dedication of property for a religious purpose. If in view of the use of the expression *'ubhayam'* the properties are taken as gift to the temple, then there can be no question of any vagueness of purpose for which the properties are dedicated. The learned counsel asked whether the Palani or other temples could ask for any particular amount or part of the income as a beneficiary. Having regard to the scope of the present suit, it is unnecessary to decide this point, nor the point whether the document dated 22nd September, 1869, was invalid or not. The decision of the Court below that the order under section 63 cannot be set aside is thus correct and needs no interference.

16. In the result, the appeal is dismissed with costs. (one set).

R.S. ——— *Appeal dismissed.*

1. (1951) 1 M.L.J. 588 : 64 L.W. 574 : A.I.R. 1952 Mad. 650.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Kumaraswami Gounder and others .. *Appellants**

v.

Subba Gounder and others .. *Respondents.*

Hindu Law—Joint family—Internal arrangement between coparceners for convenient and separate enjoyment of joint property by members—Member of joint family enjoying certain lands of the joint family, constructing house out of the income from the lands—Should be treated as joint family property.

Under the old orthodox Hindu Law, it was not clear whether in a case where there was an internal arrangement as between the coparceners of a Hindu undivided family to enjoy joint property separately for convenience, any of the members would be entitled to plead such an arrangement *inter partes*, to escape the liability to account for the income of such enjoyed properties, in a subsequently instituted action for partition by metes and bounds by any one or more of the other members. In a case where the members of a family decided for purposes of convenience to take charge of certain properties of the family and administer them, it does not axiomatically follow that the person who has been charged with the responsibilities of possessing such properties is not to account for the income which the properties of which he has taken charge would yield. But the position is different if at a family council the parties exercise their minds and carve out certain properties of the family for purposes of allotment to each of the branches and allot them to such of those sharers who are entitled thereto in lieu of their maintenance and the maintenance of their branch. If the evidence in a case establishes that there was such an allotment with the avowed purpose as above and the income derived by the

*App. No. 31 of 1970. 7th February, 1977.

allottees from the possessed properties would be their own, they would not be in any sense accountable for such income to the other members of the family. By a mere arrangement, domestic as it ought to be whereby a certain unit of a joint family or an individual takes charge of certain carved-out properties he cannot plead that such properties were allotted to him in the realistic sense of the word so as to avoid his responsibility to account for the income from such properties which he derived by reason of his enjoyment. But, if it is a case of an allotment of such properties by reason of a decision which is expressive and positive amongst the members of the family which gives a reasonable impression that such allotment was always intended to give to the allottee an absolute right over the income of the allotted properties, then it follows that if any other properties are purchased from and out of such income, it would be the properties of the allottee and his branch. [*Paras.* 4 *and* 5.]

Cases referred to:

Ramayya v. *Kolanda*, I.L.R. (1940) Mad. 322 : (1939) 2 M.L.J. 639: 50 L.W. 529 : A.I.R. 1939 Mad. 911 ; *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*, I.L.R. (1937) Mad. 990: 45 L.W. 616 : A.I.R. 1937 Mad. 571; *Nagayasami Naidu* v. *Kochadai Naidu*, (1970) 1 M.L.J. 105 : 81 L.W. 436 : I.L.R. (1969) 1 Mad. 459 : A.I.R. 1969 Mad. 329.

Appeal against the decree of the Sub-Court, Coimbatore in O.S. No. 17 of 1965.

S. Ramalingam and *P. Chidambaram*, for Appellants.

N. Varadarajan, for Respondents.

The Judgment of the Court was delivered by

Ramapradada Rao, J.—Defendants 2 to 4 and 6 to 9 in O.S. No. 17 of 1965 on the file of the Subordinate Judge of Coimbatore, are the appellants. The plaintiffs came to Court for a partition and separate possession of their half share in the suit properties under the following circumstances. Kandaswami Gounder is the common ancestor. He had two sons, Nanjappa Gounder the first defendant and Palani Gounder the first plaintiff. His other son Subba Gounder died as a bachelor in 1959. Palaniammal is his daughter. The first defendant, who is the eldest son who died pending suit is herein represented by his legal representatives, defendants 2 to 10. In fact, it is the second defendant who is contesting the action. Plaintiffs 2, 3 and 4 are the sons and daughter of the first plaintiff. The fifth plaintiff is the wife of the first plaintiff and the 4th plaintiff is the wife of the 1st defendant. The plaintiffs' case is that Kandaswami Gounder died in *Adi* 1955, prior to the Hindu Succession Act of 1956 and that therefore, Palaniammal, the daughter of Kandaswami Gounder cannot be reckoned as a sharer to the estate of Kandaswami Gounder. The plaintiffs contention is that after the death of Kandaswami Gounder in 1955, the only persons entitled to share the estate of late Kandaswami Gounder was the 1st plaintiff and his branch, Nanjappa Gounder and his branch and Subba Gounder. Subba Gounder died in 1959. Prior to his death, it is the case of the plaintiffs, that the family properties which were situate in two different villages were being enjoyed by the sons of late Kandaswami Gounder independently for the purpose of convenience and pursuant to the said arrangement, the 1st plaintiff was in charge of lands situate in Thalakarai village and the other lands situate in Ramapatnam were in the possession and convenient enjoyment of the father Kandaswami Gounder when he was alive and Nanjappa Gounder and Subba Gounder. Such convenient enjoyment of those properties having been acceeded to and worked upon by the parties out of their own will and volition, continued till the death of Kandaswami Gounder in 1955, and Subba Gounder in 1959. On the death of Subba Gounder the specific case of the first plaintiff is that there was a re-adjustment about the lands and their enjoyment by each of the surviving members of the family. As a result of such re-allocation, if that expression could be used, the first plaintiff was also entrusted with certain areas of lands in Ramapatram village besides the lands in Thalakarai, but the first defendant continued to be in charge

of the lands in Ramapatnam village Apparently this re-casting of the extent of the lands in the possession of the two surviving brothers was made consequent upon the death of Subba Gounder who was by then a third sharer in the family. In this context, therefore, the plaintiffs' case is that the 1st plaintiff and his branch would be entitled to one-half of the estate of late Kandaswami Gounder and to the other half the 1st defendant and his branch would be entitled. It is to secure independent and separate possession of such a half share, the plaintiffs came to Court. The 1st defendant's case is that Kandaswami Gounder died on 2nd August, 1956 and not in 1955 and that the date of death was after the induction of the Hindu Succession Act of 1956 and, that therefore, Palaniammal, his sister as a daughter of Kandaswami Gounder would also be a statutory heir under the Act and that her share should be allotted to her. The 1st defendant's further case is that the plaintiffs have failed to include in the partible estate, a house which was constructed by the 1st plaintiff in the lands (at) Thalakarai which were in his enjoyment and as such a construction was only possible because the 1st plaintiff and his branch were solely enjoying the income from the lands in their convenient enjoyment and as no partition by metes and bounds of the family properties ever took place, it should be presumed that the said property built by the first plaintiff should be deemed to be an accretion to joint family property and that it should be brought to the hotchpot for partition. Incidentally, he would also concede that he would be responsible for bringing into the pot for purposes of division such of the income which in law he is accountable for to the other members of the family in respect of the lands which he was conveniently enjoying as per this internal scheme of arrangement already referred to. The 1st plaintiff however, in reply would say that the house was built up several years ago and in particular, was put up by him prior to the modified arrangement internally made as between them on the death of Subba Gounder which resulted in the plaintiffs' branch being entrusted with certain lands in Ramapatnam village also for their convenient enjoyment along with the lands already held by them in Thalakarai village. In effect, the first plaintiff's case was that the house was put up by him when he was in enjoyment of the Thalakarai lands which scheme was in vogue even during the lifetime of his father and which arrangement was thought of solely for the purpose of convenient enjoyment of the family lands as between the members. Therefore, the plaintiffs resist the claim of the first defendant to bring the house property referred to in the written statement of the 1st defendant as one of the partible properties to be included in the hotchpot for the purpose of division. We are not summarising the pleading in the usual manner as it is unnecessary to do so having regard to the two main issues which were argued before us by the learned counsel in this appeal. On the pleadings, the following issues were framed by the learned Judge—

1. Whether the prior partition pleaded by the defendant is true?

2. To what share, if any, is the plaintiff entitled?

3. What are the properties available for partition?

4. Whether the suit is bad for non-joinder of necessary parties?

5. Whether the defendant is entitled to value of improvements and if so, to what amount?

6. To what relief?

The following additional issue was framed on 9th August, 1966—

1. Whether the sale deed dated 15th September, 1965 is true and valid and whether the 2nd defendant is entitled to any share under the document?

The following additional issues were framed on 28th October, 1969—

2. Whether the plaintiffs are entitled to partition?

3. What is the date of death of the father Kandaswami?

The following additional issue was framed on 24th November, 1969—

4. Whether the suit is bad for partial partition?

2. The lower Court was of the view that Kandaswami Gounder died in *Adi* 1955 and not in August 1956, as alleged by the first defendant and therefore, negatived the defendants' plea that Palaniammal also should be considered as a sharer in the estate of Kandaswami Gounder. On the other issue whether the property claimed by the 1st defendant is the property of the family, he agreed with the plaintiffs that the same would not be joint family property as according to him, the income which a member obtained from the properties held by him and possessed by him, though for convenient enjoyment, would be his separate property and cannot be treated as joint family property in which the other sharers would have an identifiable share. Therefore, he found that the only items available for partition are the plaint schedule properties and disagreed with the 1st defendant that the suit is one for partial partition. He decreed the suit on the above findings. We are not called upon in this appeal to decide whether there was a prior partition as pleaded by the defendants or whether certain other allegations regarding the sale of certain family properties is true or not. We have already prefaced by saying that the two points that are raised by the learned counsel appearing before us are—(1) whether the house property claimed by the 1st defendant and latterly by his heirs, the appellants before us, is to be treated as joint family property or not and (2) what is the date on which Kandaswami Gounder died?

3. We shall now take up the first question whether in the circumstances of this case, the property claimed by the defendants-appellants is to be included in the hotch-pot for the purpose of division amongst the sharers. This would depend upon the fact whether the nucleus with which the property was put up by the first plaintiff was joint family asset or joint property It is not in dispute that the properties were under the convenient and separate enjoyment of the members of the family and that such an arrangement was acceded to and followed up even when the father, the ancestor, was alive. P.W. 1 in his evidence would say that the house property was put up by the 1st plaintiff about 15 to 20 years ago. This not having been contradicted, would mean that the property was put up prior to the date of death of Subba Gounder. The family conceived of a scheme whereby the lands which were situate in two different villages could conveniently be enjoyed by two different sets of members without any interruption by one branch over the other. It is common ground that Kandaswami Gounder, Nanjappa Gounder and Subba Gounder as one unit were in Ramapatnam village and were in charge of the lands situate therein. Equally it is not in dispute that Palani Gounder was put in charge of the other lands of the family but situate in Thalakarai village. It is, therefore, clear that the enjoyment of each of the units as above was pursuant to a domestic scheme conceived by the father in co-ordination with his sons and it cannot be said that it was pursuant to any overt act well thought of by the members resulting in an allotment of those properties to the above units with the intention that each of such units should enjoy the income therefrom absolutely. If in a given case there was some evidence of treatment of the joint family properties by the members of the coparcenary or joint family in and by which the allotment of properties was thought of and as a result of such scheme forged by the members, one or the other of the members of the family, either individually or conjointly was put in possession of identified and identifiable properties belonging to the family, then it is quite possible to imply or presume that the members as a whole in a family council decided amongst themselves that such an allotment is not an empty one but is with a purpose. It would serve as a pointer to the conclusion that the income derived by each of such members or units of the family put in possession of such separated properties should

enjoy the income as if it is their own without any responsibility to account therefor to the other members or other units of the family.

4. Under the old orthodox Hindu Law, it was not clear whether in a case where there was an internal arrangement as between the coparceners of a Hindu undivided family to enjoy joint property separately for convenience, any of the members would be entitled to plead such an arrangement ***inter partes***, to escape the liability to account for the income of such enjoyed properties, in a latterly instituted action for partition by metes and bounds by any one or more of the other members. Mullah's Hindu Law, 14th Edn., page 293, dealing with rights of coparceners states—

> "The whole income of the joint family property must be brought, according to the theory of an undivided family, to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of an undivided family......"

But the learned author noted the strides and consequentdents made to this well-established principle by citing judicial precedents. In *Ramayya* v. *Kolanda*[1], the ratio laid down in *Bengal Insurance and Real Property Co. Ltd.* v. *Velayammal*[2], was accepted. These authorities always rested on the well-known principle that if an allotment of property to any member was made by the manager of the joint family, then such allotment should be presumed to have been made by him not with the intention of making the allottee member accountable for the income of the property allotted. The learned Judges said—

> "The idea, undoubtedly when an arrangement of this kind is made, is that while the corpus of property should continue to remain joint the income should exclusively belong to and be at the disposal of the member concerned.".

But, in the case before us, the allotment was not made by the manager or the head of the family, Kandaswami Gounder. The evidence discloses that what was taken over by the 1st plaintiff during the lifetime of his father was not in pursuance of an allotment of land, but pursuant to an arrangement for purposes of convenient and sole enjoyment. Until Subba Gounder died, the plaintiff did not have anything to do with Ramapatnam lands. It was only after the death of Subba Gounder an allotment, if at all, was thought of by the family. Prior to it, there was no such domestic, internal adjustment equitable to an allotment of properties which was done by the manager in the two reported decisions cited above. We are, therefore, constrained to make a distinction between the two well-known situations which may normally arise. In a case where the members of a family decided for purposes of convenience to take charge of certain properties of the family and administer them, it does not axiomatically follow that the person who has been charged with the responsibilities of possessing such properties is not to account for the income which the properties of which he has taken charge would yield. But the position is different if at a family council the parties exercise their minds and carve out certain properties of the family for purposes of allotment to each of the branches and allot them to such of those sharers who are entitled to it in lieu of their maintenance and the maintenance of their branch. If the evidence in a case establishes that there was such an aollument with the avowed purpose as above, then the ratio in the above two decisions would apply and the income derived by the allottees from the possessed properties would be their own and they would not be in any sense accountable for such income to the other members of the family. That this appears to be the only way to reconcile the situations is clear from the observations of the Division Bench of our Court in *Nagayasami Naidu* v. *Kochadai Naidu*[1]. The learned Judges said:

1. I.L.R. (1940) Mad. 322 : (1939) 2 M.L.J. 639 : 50 L.W. 529 : A.I.R. 1939 Mad. 911.
2. I.L.R. (1937) Mad. 990 : 45 L.W. 616: A.I.R. 1937 Mad. 571.

1. (1970) 1 Mad. L.J. 105: 81 L.W. 436 : I.L.R. (1969) 1 Mad. 459 : A.I.R. 1969 Mad. 329, 345.

"The very idea of allotment for convenient enjoyment, though reserving a right to effect a final partition by metes and bounds, carries with it the necessary implication that the two branches were entitled to deal with the income accruing from the properties allotted to them in any manner they like and either branch will have no claim as against the other in respect of properties purchased out of such income."

The learned Judges laid an accent on the word 'allotment'. We are also of the view that by a mere arrangement, domestic as it ought to be, whereby a certain unit of a joint family or an individual takes charge of certain carved-out properties he cannot plead that such properties were allotted to him in the realistic sense of the word so as to avoid his responsibility to account for the income from such properties which he derived by reason of his enjoyment. But if it is a case of an allotment of such properties by reason of a decision which is expressive and positive amongst the members of the family which gives a reasonable impression that such allotment was always intended to give to the allottee an absolute right over the income of the allotted properties, then it follows that if any other properties are purchased from and out of such income, it would be the properties of the allottee and his branch.

5. In the instant case, however, there is no proof that the property sought to be included by the appellants in the joint pool was built or accreted to the joint family by the first plaintiff at a time when there was an allotment of the joint family properties pursuant to a decision taken by the members and the sharers thereof. On the other hand, it has been brought out that the suit property was put up about 15 to 20 years prior to the date when P.W. 1 was examined, which takes us back to a date before the death of Subba Gounder. It is the common case of all parties that prior to the death of Subba Gounder, the father, the first defendant and Subba Gounder as a unit were in possession of the Ramapatnam village lands whilst Palani Gounder was in possession of Thalakarai lands. This was not in pursuance of a scheme of allotment, but only a casual arrangement entered into between the family members for purposes of convenient enjoyment. If this distinction is borne in mind, then the 1st plaintiff cannot escape the obligation to account for the income which he secured by way of surplus income and which obviously went into the building of the property in question. It was pleaded that P.W. 1's maternal uncle helped his father in putting up the superstructure. But, there is no record to support P.W. 1's statement. The learned Judge sweepingly applied the proposition that everything which is an accretion, everything which is an improvement to joint family properties, cannot be treated as joint family property if it is the case of the litigants that such property was in the enjoyment of one or the other of the sharers separately even though for convenience. According to the lower Court, if each branch had been given certain properties for their own maintenance or convenience, they are not accountable for the income and that the first plaintiff had used his savings from such income to construct the house and therefore, it would not become the joint family property. As a general proposition, this is a correct statement of law. But on the facts and circumstances of this case, there is no evidence to show that the properties in Thalakarai were entrusted to the 1st plaintiff's branch for their maintenance or were allotted to them with no responsibility to account for the income which they derived from such possessed properties. In the view we have taken that in the absence of proof of allotment of such identifiable properties by virtue of a scheme thought of openly by the members of the joint family, it could only be said that the parties were in enjoyment of it for purposes of convenience and that their ancillary responsibility to account does not disappear as a matter of course. We, therefore, agree with Mr. Ramalingam that the lower Court though it stated the proposition of

law correctly ought not to have held that the property in dispute which was admittedly put up by the 1st plaintiff (at a time when he was only conveniently enjoying certain lands of the joint family in a particular village) out of the income of such properties can axiomatically be said to be his property on the foot that he was enjoying those lands in Thalakarai as if they were allotted to him and his branch for purposes of their maintenance. The first point is, therefore, found in favour of the appellants. To this extent, the appeal has to be allowed.

6. The second point is as to when Kandaswami Gounder, died. Whilst the appellants would say that he died on 2nd August, 1956, the respondents would say that he died in *Adi* 1955. Mr. Ramalingam, himself hesitantly contended that Kandaswami Gounder died after the passing of the Hindu Succession Act. Reliance was sought to be placed on Exhibit B-7 which is a death extract relating to one Kandaswami Gounder. No corroborative proof has been adduced to show that Exhibit B-7 relates to Kandaswami Gounder, the father of the 1st plaintiff, the first defendant and Subba Gounder. The lower Court rightly said that intrinsically Exhibit B-7 cannot relate to Kandaswami Gounder, who is the common ancestor in this litigation. The informant has not been shown to be any near relation of Kandaswami Gounder, but he is shown in Exhibit B-7, as the son of Kandaswami Gounder. This itself belies that Exhibit B-7 has anything to do with the father of the first defendant. As against this and the other oral evidence let in by the defendants we have Exhibit A-28, which is an application sent by the 1st plaintiff, 1st defendant and their sons to the Secretary of the Land Mortgage Bank Ltd., Pollachi for obtaining transfer of certain shares standing in the name of Kandaswami Gounder in favour of Nanjappa Gounder. This is dated 15th October, 1959. All the contesting parties to the present litigation concede that Kandaswami Gounder died about 4 years prior to the date of the application and that he discharged the debt payable to the Bank by 3rd November, 1955. The parties do not dispute the genuineness of Exhibit A-28. If Kandaswami Gounder died 4 years prior to the date of the application, Exhibit A-28, obviously it means that he died in 1955 and not in the year 1956 at all. If it is not in the year 1956, it follows that it is prior to the induction of the Hindu Succession Act. The argument of Mr. Varadarajan, learned counsel for the respondents that if really Palaniammal did secure certain rights, it is easily conceivable that she could have also been made a party to the said application. That has not been done. One other document Exhibit A-32 on which reliance was sought to be placed is an entry made in the *chitta* register by the village karnam. In the remarks column, there is an entry by the karnam which is said to have been made on 15th September, 1956, wherein he purports to have mentioned the name of the pattadar, Kandaswami Gounder who died on 2nd August, 1956. But it is curious that the karnam of the village appended to the report in this *chitta* a recital which is totally unconnected with the subject with which he was dealing. The karnam is not examined on the ground that he was very enfeebled. We are unable to place any reliance on the entry written in Exhibit A-32, which remains uncorroborated and which is completely out of the context in which it was written that Kandaswami Gounder died only after the passing of the Hindu Succession Act, to wit, on 2nd August, 1956. The Court below rightly held that the entry regarding the date of death of the pattadar in a *chitta* register is a very unusual mode of recital when a question of transfer of registry is in issue. In fact, the lower Court compared the disputed entry with other similar entries and did not find any such remarks about the date of death of the prior pattadar in any other case referred to in the *chitta*. Obviously, therefore, the karnam was helpful enough to the defendants and this entry purporting to notify the date of death of the quondam pattadar is purely a self-serving one. The other documentary evidence relied upon by the defen-

dants such as Exhibits B-14, A-21, A-26 and A-27 do not help them either. Exhibit B-14 is a kist receipt book in respect of the lands in Ramapatnam village. It is found that the kist was paid in the name of Kandaswami Gounder till 1956. Therefore, it is sought to be made out that Kandaswami Gounder was alive in 1956. It is not unusual to expect that public records are not changed and mutation is not effected promptly by the heirs after the death of the quondam owner. This necessitates the continuance of the name of the ancestor in such public records and payments also are accepted in such names. This by itself is not conclusive. To a similar effect are Exhibits A-21, A-26 and A-27. It is unnecessary for us to consider any other evidence in this case in the light of Exhibit A-28 to which all concerned are parties and Palaniammal was significantly not a signatory to the said application. The lower Court was, therefore, right in having held that Kandaswami Gounder died before the Hindu Succession Act became law and in fact, he died in 1955 and not in 1956. We are unable to agree with the second contention of the learned counsel for the appellants.

7. Whilst therefore we sustain the judgment of the Court below, we allow this appeal in part and direct that the house mentioned by the first defendant as the property to which the plaintiffs are accountable shall be treated as joint family property. The appellants in their turn ought to account for the income from the joint family properties in their possession until a re-adjustment and an allotment of the properties were made after the death of Subba Gounder in 1959. The parties will, therefore, account for the income from the properties which were in their respective, possession from 1948 till 1959 when the new scheme of allotment was thought of and implemented. As regards the mesne profits payable by one to the other in respect of their respective occupation of the joint family properties, the parties are relegated to an independent enquiry thereof under Order 20, rule 12, Civil Procedure Code.

The appeal is accordingly allowed in part and there will be no order as to costs.

R.S. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

S. Jabaperumal .. *Appellant**

v.

Central Bank of India, a body corporate wholly owned by the Government of India incorporated under Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having its head office at Bombay through its Agent at Beach Road, Tuticorin and others

.. *Respondents.*

(A) *Banking Companies (Acquisition and Transfer of Undertakings) Act (V of 1970), section 3—Central Bank of India, if came to be formed in pursuance of a special Indian law.*

(B) *Tamil Nadu Agriculturists' Relief Act (IV of 1938) not applicable to loans granted by Bank.*

When the Central Act (V of 1970), The Banking Companies (Acquisition and Transfer of Undertakings) was passed, 14 new undertakings or banks came into existence and they took over the assets and liabilities of banks carrying on a similar task earlier. Instead of enacting 14 separate statutes for the purpose of bringing into existence the respective banks, Parliament passed a single enactment and created 14 banks under that enactment. These banks, whose names are set out in the first Schedule, were all banks which came into existence as a result of a special enactment, *viz.*, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. They did not come into existence, and were not incorporated, under any other law. Therefore even under the provi-

* A.S. No. 542 of 1973. *13th December,* 1977.

sion as it was prior to the amendment in 1973, Tamil Nadu Act (IV of 1938) did not apply to loans advanced by banks like the Central Bank.

Appeal against the decree of the Court of the Principal Subordinate Judge, Tuticorin, dated 22nd March, 1975 passed in Original Suit No. 83 of 1972.

K. Krishnamurthy, for Appellant.

P. B. Sundararaju, for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant in O. S. No. 83 of 1972 in the Court of the Subordinate Judge of Tuticorin is the appellant. The plaintiff is the Central Bank of India and it filed a suit against the defendants for recovery of a sum of Rs. 10,937.31 with further interest and costs. The first defendant had executed a promissory note for Rs. 20,000 in favour of the Bank undertaking to repay the loan with interest at 4 per cent. per annum over the Reserve Bank rate with a minimum of 9 per cent. per annum with half-yearly rests. By way of an equitable mortgage, the first defendant deposited his title deeds and he executed also a hypothecation bond covering his banana crops on the land. Defendants 2 and 3 are the guarantors. The first defendant had paid various amounts and the sum claimed in the suit is the balance after giving credit for the amounts paid by the first defendant. In his written statement, the first defendant contended, *inter alia,* that he was an agriculturist and that the plaintiff was not entitled to recover interest at more than 6¼ per cent. per annum according to the provisions of Tamil Nadu Act IV of 1938. The learned Subordinate Judge went into the question whether the 1st defendant was an agriculturist entitled to the benefits of Act IV of 1938 and came to the conclusion that, though he was an agriculturist, he was not entitled to the benefits of Act IV of 1938. It is this conclusion of the learned Subordinate Judge which is now challenged before me.

2. The only point that arises is whether the first defendant is entitled to the benefits of Tamil Nadu Act IV of 1938. Section 4 of the Act as it was in force prior to the amendment in 1973, to the extent necessary, ran as follows:

> "Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:
>
> any liability in respect of any sum due to any co-operative society, including a Land Mortgage Bank, registered or deemed to be registered under the Madras Co-operative Societies Act, 1932, or any debt due to any corporation formed in pursuance of an Act of Parliament (of the United Kingdom) or of any special Indian Law or Rayal charter or Letters Patent."

The point to be examined is whether the Central Bank is a Bank formed in pursuance of any special Indian law. The Banking Companies (Acquisition and Transfer of Undertakings) Act (V of 1970) was published on 1st March, 1970. It repealed the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1970. Section 3 of the said Act provided that:

> "3. (1) On the commencement of this Act, there shall be constituted such corresponding new banks as are specified in the first Schedule."

The Central Bank of India is the first of the entries in the First Schedule. The learned counsel for the appellant contended that, even though the Central Bank of India might have come into existence under the Central Act V of 1970, still, it cannot be said to be a bank formed in pursuance of any special law. I am unable to accept this submission. It may be remembered that, at the time when the Central Act V of 1970 was passed, 14 new undertakings or banks came into existence and they took over the assets and liabilities of banks carrying a similar name earlier. Instead of enacting 14 separate statutes for the purpose of bringing into existence the respective banks, the Parliament passed a single enactment and created 14 banks under that enactment. These banks, whose names are set out in the First Schedule, were all banks which came into existence

as a result of a special enactment, *viz.*, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. They did not came into existence, and were not incorporated, under any other law. Therefore, even under the provision as it was prior to the amendment in 1973, Tamil Nadu Act IV of 1938 did not apply to the loans advanced by a bank like this. The Court below, therefore, was right in its conclusion that, though the first defendant was an agriculturist, he could not got the benefits of Tamil Nadu Act IV of 1938 because of a special provision of exemption under section 4 (3) covering loan in favour of a bank like this. In this view, it is unnecessary to go into the question whether the amendment to Tamil Nadu Act IV of 1938 was retrospective in character. The appeal is accordingly dismissed with no order as to costs.

R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Panchalai Ammal .. *Petitioner**

v.

Muthulakshmi Ammal .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (as amended by Act (XXIII of 1973), section 14 (1) (a)—Petition for eviction on the ground of effecting repair—Bona fides *of the landlord—Tests to be applied.*

The *bona fide* under section 14 of the Tamil Nadu Buildings (Lease and Rent Control) Act has been held to be not tested by stringent standards when an application for eviction is filed under that provision. A safeguard is however given to the tenant that after the completion of the repairs, the building shall be offered to the tenant. If this is kept in the background, the question of *bona fide* pales into less significance and it cannot be put against the 'landlord' by applying the test stringently.

[*Para.* 2.]

Case referred to:—

Selvaraj v. *Narasimha Rao,* (1969) 1 M.L.J. 587.

Petition under section 25 of Act XVIII of 1960 as amended by Act XXXIII of 1973 praying the High Court to revise the order of the Court of Small Causes, (II Judge), Madras dated 10th January, 1975 and made in H.R.A. No. 218 of 1974 (H.R.C. No. 301 of 1972) (VII Judge, Court of Small Causes, Madras).

S. Balasubramaniam and *R. Nagarajan,* for Petitioner.

V. M. Rajavelu and *S. Eswaran,* for Respondent.

The Court delivered the following

JUDGMENT.—The landlady under the Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) (hereinafter referred to as the Act) is the petitioner in this revision. The respondent herein is the tenant. The landlady filed a petition under section 14 (1) (*a*) of the Act for eviction of the tenant from the portion occupied by her in the petition premises on the ground that she *bona fide* required the said portion to effect repairs. This move of the landlady was resisted by the tenant. The petition H.R.C. No. 301 of 1972 was heard by the VII Judge Court of Small Causes, Madras and on a consideration of the materials placed before him, he found that the requirement, as projected by the landlady, is *bona fide* and ordered eviction of the tenant. The tenant filed an appeal H.R.A. No. 218 of 1974 which came to be heard and disposed of by the II Judge, Court of Small Causes, Madras. The appellate authority came to the conclusion that the requirements of the landlady are not *bona fide* and in this view, he reversed the order of the Rent Controller and dismissed the eviction petition preferred by the landlady. The present revision is directed against the orders of the appellate authority.

*C.R.P. No. 647 of 1975. *2nd February,* 1978.

2. It is needless to point out that the *bona fide* under section 14 of the Act has been held to be not tested by stringent standards when an application for eviction is filed under that provision. While laying down the test regarding *"bona fides"* under section 14 (1) (*b*) of the Act, a Division Bench of our High Court in *Selvaraj* v. *Narasimha Rao*[1], has laid down as follows:—

> "The quality and content of the expression *bona fide* appearing in the various sections of the Act for purposes therein enumerated have to be weighed and construed on different lines under different circumstances having regard to the context in which the expression appears. Section 16 of the Act affords a statutory right to the tenant to reclaim possession of a building secured by the landlord under section 14 (1) (*b*) if he does not substantially demolish the building and attempt a reconstruction as proposed. This controlling provision provides as it were a key to the interpretation of the expression *'bona fide'* appearing in section 14 (1) (*b*) of the Act. It appears to us that in cases where the claim of the landlord is not *per se* dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunals constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with".

I find that section 14 (2) (*a*) of the Act reads as follows:

> "(2) No order directing the tenant to deliver possession of the building under this section shall be passed—
> (*a*) on the ground specified in clause (*a*) of sub-section (1), unless the landlord gives an undertaking that the building shall, on completion of the repairs, be offered to the tenant, who delivered possession in pursuance of an order under sub-section (1) for his re-occupation before the expiry of three months from the date of the recovery of possession by the landlord, or before the expiry of such further period as the Controller may, for reasons to be recorded in writing, allow".

Here is a safeguard given to the tenant that after the completion of the repairs, the building shall be offered to the tenant. If we keep this in the background, we find that the question of *bona fide* pales into less significance and it cannot be put against the 'landlord' by applying the test stringently.

3. On the facts of the case, I find that a notice has been issued by the corporation treating the premises concerned as in a ruinous condition and demanding rectification of the same by the landlady. The loss of time between the filing of the petition and the issue of the notice will not be a factor that would militate against the *bona fides* of the landlady. The appellate authority has chosen to apply a very stringent test of *bona fide* to negative the claims of the landlady. This is not the proper approach especially when we remember the principles regarding the *bona fides*, laid down by this Court. In this view, I find that the order of the appellate authority suffers from an irregularity, illegality and impropriety. Hence this revision is allowed and the order of the appellate authority is set aside and the order of the Rent Controller is restored, and taking into consideration the facts and circumstances of the case, the respondent-tenant will have six months time to vacate and the learned counsel for the petitioner has no objection to the grant of such a time. No order as to costs.

R.S. ——— *Petition allowed.*

1. (1969) 1 M.L.J. 587.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

Bandi Chalapathy Rao and another .. *Appellant**

v.

The Official Assignee, Madras .. *Respondent.*

The Official Assignee of Madras .. *Applicant*

v.

Bandi Chalapathy Rao .. *Respondent.*

and

The Official Assignee, Madras .. *Applicant*

v.

M|s. Goel Roadways .. *Respondent.*

(A) *Presidency Towns Insolvency Act (III of* 1909), *sections* 7 *and* 36—*Mutual dealings—Claim of set-off — Application by Official Assignee under section* 9—*Objection taken at trial stage before Insolvency Judge—Parties cannot be canvassed again at appellate stage.*

(B) *Tort—Carrier—Nature of rights and obligations of carrier, different from that of bailee—Contract of carriage—Claim for transport charges by carrier by way of set-off against the insolvent company, if allowable—"Mutuality of dealings", meaning.*

The residuary power in the Insolvency Court to decide all questions of priorities and all other questions whatsoever, whether of law or of fact which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case is provided for expressly in the statute. When the Legislature has vested the Insolvency Court with a manifest jurisdiction to consider all questions in the name of expediency and convenience, then the very objective which the section serves is obvious. It is not only to afford speedy justice either to the Official Assignee as representing the body of creditors, or to a creditor of the insolvent estate under certain circumstances, but the way in which it runs through the process created by a special provision in this Act reflects on the main concept, *viz.*, that the Insolvency Court is expected to render complete justice or substantial justice while adjudicating the matters which come before it for a decision. [*Para.* 9.]

A contract of carriage has certain peculiar ingredients in-built in it. No doubt, for all outward purposes it is a contract for the carriage of goods which were entrusted by one party to the other. But, a contract of carriage is not an equation of a contract of bailment, nor is the carrier liable as a bailee. On the other hand, there is inbuilt in such contracts the element of an insurance contract, for, it could reasonably be said that the carrier is equatible to an insurer, who undertakes the carriage of the goods with all the attendant risks of such carriage. If, therefore, the carrier is not a bailee, but, for all legal purposes an insurer, then the question arises whether the entrustment of goods by the insolvent in the instant case was with the sole and only purpose of the return of the goods so entrusted and no more.

[*Para.* 11.]

Cases referred to:—

Official Assignee, Madras v. *Narasimha Mudaliar,* (1929) I.L.R. 52 Mad. 717: 30 L.W. 159: 57 M.L.J. 145: A.I.R. 1929 Mad. 705 (F.B.); *Lakshmi* v. *Official Assignee,* 63 L.W. 115: (1950) 1 M.L.J. 12: I.L.R. (1950) Mad. 895: A.I.R. 1950 Mad. 410 (F. B.); *Sakkubai Ammal* v. *Babu Reddiar,*

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*O.S.A. Nos. 50 of 1973 and 75 of 1975.

17*th August,* 1977.

(1977) 90 L.W. 110; *Krishna Chandra* v. *Dhanathandar and Company,* A.I.R. 1935 Cal. 225;*Sundaravaradan* v. *Official Liquidator, T. N. B. Subsidiary,* 1939 M.W.N. 1231: A.I.R. 1940 Mad. 266; *Gokul Chit Fund* v. *T. K. O. Vareed,* (1977) 47 Comp. Cas. 264: 1976 K.L.T. 747: A.I.R. 1977 Ker. 68; *Rose* v. *Hart,* 129 E.R. 477; *Rolls Sewer Ltd.* v. *Cox,* (1967) 1 All E.R. 397: (1967) 1 Q.B.D. 522: (1967) 2 W.L.R. 241.

O.S.A. No. 50 of 1973: Appeal under clause 15 of the Letters Patent against the orders of Gokulakrishnan, J., deted 6th July, 1973 and 13th July, 1973 and made in the Insolvency Jurisdiction of the High Court in Application No. 54 of 1972 in Petition No. 40 of 1970.

O.S.A. No. 75 of 1975: Appeal under clause 15 of the Letters Patent against the orders of Mohan, J., dated 4th July, 1975 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 513 of 1971 in I.P. No. 40 of 1970.

P. Sivaramakrishnaiah and *P. B. Krishnamoorthy,* for Appellant.

The Official Assignee, Madras, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—When these two appeals were taken up, Mr. Sivaramakrishnaiah appearing for the appellant in O.S.A. No. 50 of 1973 as also Mr. Dolia in O.S.A. No. 75 of 1975 have raised a preliminary objection that the Judge sitting in insolvency ought not to have enquired into the Judge's summons taken out by the Official Assignee under section 7 of the Presidency Towns Insolvency Act and given a judgment on the merits. Their contention is that this is a case in which the appellant in each of these appeals did not admit the liability as set out in the report of the Official Assignee and as claimed by him in the Judge's summons and at all material times there was a contest by the appellants regarding their liability to the claim made by the Official Assignee. Mr. Sivaramakrishniah arguing on the preliminary objection would say that the proviso to section 7 of the Act having been introduced with a distinct purpose has a meaning and a significance to serve. He would invite our attention to the history of sections 7 and 36 of the Presidency Towns Insolvency Act and would contend that the Parliament was prompted to amend section 36, clauses 4 and 5 and introduce the proviso to section 7 of the main Act only with the definite purpose and objective to avoid a summary investigation of claims by the Insolvency Court without going through the process available under the common law. He would in the main rely upon the Full Bench decision of our Court and would say that the Insolvency Court not having adopted or followed the ratio in that decision the ultimate conclusions rendered by the said Court cannot be taken to be an enforceable judgment and, therefore, this appeal has to be allowed on that ground after upholding the preliminary objection. The Official Assignee on the other hand would say that such an objection was taken at the trial stage before the insolvency Judge and the said objection was negatived and overruled and it was only thereafter that the parties entered upon the Judge's summons and went into a trial on the triable issues arising therein and that the parties willingly let in oral and documentary evidence in support of their respective contentions and that in the circumstances therefore it is not still open to the appellants to raise once over the objections that the Judge's summons is not investigable by the insolvency Court. One other point that was also stressed before us was that it was in the discretion of the insolvency Judge after a *primt facie* examination of the material touching upon the Judge's summons to decide whether he should take up the cause and investigate it and ultimately decide it or direct the Official Assignee to file an independent suit under the provisions of the common law. In the instant case the insolvency Court having exercised such a discretion and the parties having by necessary implication surrendered to it and waived their objec-

tions after their preliminary objection was overruled cannot, in this Court as an appellate Court, reopen the question and canvass once again the position that the Judge's summons is not maintainable.

2. No doubt, it is true that section 7 of the Presidency Towns Insolvency Act, hereinafter referred to as the Act as it stood without the proviso added to it in 1927 gave plenary powers to the Court to decide on all questions whatsoever whether of law or of fact which may arise in any case of insolvency coming within the cognizance of the said Court. There was also the ancillary powers to the insolvency Court under the said provision to decide any question if in its opinion it was necessary or expedient to do so for doing complete justice or making a complete distribution of the property in any such case. The latter portion of section 7 therefore reflects the discretionary power in the Court to decide such matters. Expediency, necessity or obligation to render complete justice for the purpose of making equitable distribution of the involvent's property are all matters which the insolvency Court can look into for purpose of considering whether the question before it has to be decided by it or such questions have to be relegated to a civil Court for a fuller adjudication of the subject-matter. If once the Insolvency Court decides that the matter could be dealt with by it—may be on the ground of expediency or necessity, may be also on the ground that it was to entertain and decide upon it so as to render justice, all such incidents reflecting upon the exercise of jurisdiction by the Court are pointers to the fact that the Court exercised its discretion one way or the other. It is not obligatory for a Court to look into a Judge's summons filed by the Official Assignee and brought before it, in other cases to adjudicate upon it. It may reject it as well on the ground that in its opinion it is neither expedient nor necessary to decide such matter in summary way. But, there may be cases also wherein the Court in the exercise of its discretion as a well-instructed institution take up such matters on file for decision and ultimately decide it for itself. If after the exercise of such jurisdiction—may be a discretionary jurisdiction, the Court calls upon the parties before it which in an insolvency Court will invariably be the Official Assignee on the one side, and the debtor or the insolvent on the other, then it is for the aggrieved party, namely the insolvent's debtor to take such necessary steps to see that the further progress of hearing of the subject-matter by the insolvency Court is stemmed by taking up the matter further in appeal. Section 8 of the Act provides for appeals in insolvency. It is not in dispute before us that any order made by an insolvency Court on a preliminary objection taken by the aggrieved party before it regarding the exercise of its discretionary jurisdiction under section 7 is appealable. In fact, in O.S.A. No. 50 of 1973, Gokulakrishnan, J., in Application No. 391 of 1972 passed the following order:—

> "This is an application for deciding the issue regarding jurisdiction of this Court under section 7 of the Presidency Towns Insolvency Act as a preliminary issue. I do not consider it proper to dismiss the application filed by the Official Assignee as not being maintainable under section 7 of the Act. The matter can as well be considered in the main petition and a comprehensive order may be passed. Time and unnecessary proceedings can be saved if this application is dismissed at this stage relegating the consideration of the issue in the main petition. In that view, this application is dismissed".

3. Mr. Dolia would also represent before us that it was about this time that he wanted to raise additional grounds and wanted that his preliminary objection should also be noted by the insolvency Judge. But, it is common ground that the parties never interdicted the further progress of the hearing of the Judge's summons by challenging the order of Gokulakrishnan, J., in any manner known to law. In this view, therefore, the parties had waived their objection after having been notified that

their objection is not sustainable, and not only this; the parties had participated in the enquiry, filed documents, let in oral evidence and ultimately took the decision of the learned Judge. In such circumstances we are afraid that it is not open to the appellants before us to raise once again the preliminary objection about the maintainability of the Judge's summons and expediency of the hearing of such Judge's summons by the insolvency Court. It is too late in the day to do so.

4. We however entirely agree with Mr. Sivaramakrishniah that *Official Assignee, Madras* v. *Narasimha Mudaliar*[1], is an authority for the proposition that "no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims; only simple cases capable of easy and speedy proof should be so dealt with". We respectfully adopt the observations of Beasley, J., who spoke for the Full Bench in the main. In fact, this was the opinion of the Full Bench also as is seen from the observations of Sir Murray Coutts Trotter, C.J., who said: "I have had the advantage in this case of perusing the judgment about to be delivered by Beasley, J. It sums up the results arrived at after a long discussion between him, Odgers, J., and myself and *it may be taken to be judgment of the Court*" (the Italics is ours). The Full Bench therefore, laid an embargo as to investigation on claims which are complicated and not simple. Of course, the learned Judge whose judgment is challenged before us has characterised the claim before him as a simple money claim, but, have not adverted to the merits. Therefore, we refrain from making any observation on the content of the claim. But, suffice it however, to say that the Judge's summons can only be in matters when the Official Assignee or other persons authorised in law take out an application under section 7 requesting the insolvency Court to adjudicate upon summary claims, claims which are not difficult and claims which could be adjudicated summarily. But, once a claim which was brought up to the Court has suffered a trial, and in that trial the parties who are aggrieved at such a trial did participate and saw through the end of the same, they cannot be allowed to approbate and reprobate and thereafter complain that such a trial was neither expedient nor necessary and ought not to have been undertaken.

1. (1929) I.L.R.52 Mad. 717 : 30 L.W. 159: 57 M.L.J. 145 : A.I.R. 1929 Mad.705 (F.B.).

5. In our view, it is not necessary to consider the import of the Full Bench decision reported in *Lakshmi* v. *Official Assignee.*[1] That was a case which revolved upon the interpretation of section 36 of the Act and the adding up of the proviso to section 7 of the Act. The majority of the Judges, nay, all the Judges were of the view that it is not necessary that there should be an application under section 36 made by the Official Assignee or the person authorised so as to argue whether the subject-matter would come under section 36 or not. Having said this the learned Judges did not go into the question whether the ratio in *Official Assignee, Madras* v. *Narasimha Mudaliar*[2], is correct or not. We are not inclined at this stage to go into the further question as was attempted by Mr. Dolia whether the subject-matter in this case would squarely come under section 36 or not. This is again because the appellants when they were asked to act and called upon to speak failed to do so and did not even prefer an appeal against the order of the insolvency Court which called upon them to proceed with the trial on the foot that it had the discretion to enquire into the subject-matter under section 7 of the Act.

6. Primarily for the reason that the parties have actively participated in the enquiry before the insolvency Court and as the judgment in question is not challenged as one rendered without jurisdiction, and as the decision is the resultant

1. (1950) 1 M.L.J. 123 : I.L.R. (1950) Mad. 895 : 63 L.W. 115 : A.I.R. 1950 Mad. 410 (F.B.)

2. (1929) I.L.R. 52 Mad. 717 : 30 L.W. 159 : 57 M.L.J. 145 : A.I.R. 1929 Mad. 705 (F.B.).

of the discretionary jurisdiction of the insolvency Court, we are unable to uphold the preliminary objection. The appeal will be therefore, set for further arguments on merits.

The Judgment of the Court was delivered by

*Ramaprasada Rao, J.**—We have already dealt with in our judgment rendered on 26th July, 1977, the preliminary objection raised by the appellants that the Court exercising jurisdiction under section 7 of the Presidency Towns Insolvency Act, 1909, could not in such proceedings enquire into the subject-matter in controversy and held that the insolvency Court did have the jurisdiction, and even otherwise, as the parties before it participated in the enquiry and the decision is the resultant of the discretionary jurisdiction of the insolvency Court, it is too late in the day to harp upon the preliminary objection. In these circumstances, the preliminary objection raised by Mr. Sivaramakrishniah and Mr. Dolia was not sustained by us.

8. We shall, therefore, proceed to deal with the merits in each of these cases. O.S.A. No. 50 of 1973 is against the order of Gokulakrishnan, J., passed in Application No. 54 of 1972. The learned Judge after an elaborate enquiry upheld the contention of the Official Assignee that the carrier is bound to account for the value of the goods entrusted to him for carriage. In the result, the learned Judge directed the appellant before us and the carrier to pay to the Official Assignee a sum of Rs. 29,474 with interest thereon at the rate of 6 per cent. per annum from 6th July, 1973 till date of payment. O.S.A. No. 73 of 1975 is against the order of Mohan, J., in Application No. 513 of 1971. There again, the learned Judge after due enquiry into the merits of the case accepted the Official Assignee's case and directed the carrier who is the appellant before us in this appeal to furnish a detailed statement of all the goods in their possession which they have not delivered to the parties at the respective places of destination and to hand over the same to the Official Assignee or pay their value as set out in the schedule to his order. The learned Official Assignee says that the value of such goods as per the schedule as above amounts to Rs. 1,19,398-88. Incidentally, the question whether the appellants as carriers were entitled to set-off was argued before both the trial Judges, but it did not gain favour with them. The appellants having been denied that right to set-off the amounts due to them towards hire charges from the company in insolvency and having accepted the judgment on merits rendered by the learned Judges as above, canvassed the only point about their entitlement to a set-off as against the decree awarded by both the learned Judges. In O.S. A. No. 50 of 1973, the Official Assignee himself concedes that after the necessary investigations the amounts due and payable by the quondam company in insolvency to the appellant is Rs. 31,684 and that a sum of Rs. 1,47,502 is due by the Company to the carrier in O.S.A. No. 75 of 1975. In the above context of merits in both these appeals, and after the disposal of the question on the preliminary point raised by the learned counsel for the appellants in our order, dated 26th July, 1977, these matters have been set down once again for hearing on the question whether the appellants are entitled to a set-off as against the claim of the Official Assignee towards which he has secured a money decree from the trial Court in both the applications.

9. Before we proceed with the consideration of the relative contentions of parties, it is convenient to refer to the prayer of the Official Assignee in the Judges Summons which he took under section 7 of the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as the Act). The residuary power in the insolvency Court to decide all questions of priorities and all other questions whatsoever, whether of law or of fact which may arise in any case of insolvency coming within the cognisance of the Court or which the Court may deem expedient or necessary to decide

* 17th August, 1977.

for the purpose of doing complete justice or making a complete distribution of property in any such case is provided for expressly in the statute. We have, to some extent, in our earlier order referred to the scope and content of the power of the insolvency Court while dealing with such questions arising in insolvency. When the Legislature has vested the insolvency Court with a manifest jurisdiction to consider all questions in the name of expediency and convenience, then the very objective which the section serves is obvious. It is not only to afford speedy justice either to the Official Assignee as representing the body of creditors or to a creditor of the insolvent estate under certain circumstances, but the way in which it runs through the process created by a special provision in this Act reflects on the main concept, *viz.*, that the insolvency Court is expected to render complete justice or a substantial justice while adjudicating the matters which come before it for a decision. The Official Assignee bearing this in view has sought in the Judge's summons for a relief which runs thus: "Why the respondent herein should not be directed to hand over the goods described in the schedule to the report filed hereto or in the alternative to pay its value". Even at the threshold, therefore, the Official Assignee was conscious that the *status quo ante* should be restored by the redelivery of the goods handed over to the carrier for transit, or if the carrier is unable to return or redeliver such goods or otherwise explain their absence, the carrier should be made liable for the loss in the sense that he should reimburse the estate with all the loss attendant upon such non-delivery of the goods entrusted for carriage. It is not also in dispute in this case that the appellants in each of the appeals were the accredited carriers of this insolvent company and it is in this sense that a regular account appears in the books of account of the insolvent showing the quantum of the amount due and payable by the estate to the carrier as and towards hire charges. Obviously, this account shows a money debt. The claim in the alternative made by the Official Assignee was also for money in case the carrier was unable to return the goods *in specie*. With this necessary facts we shall now consider the forcible objection taken by the Official Assignee against the claim for set-off asked for by the appellants.

10. After referring to section 47 of the Act, the main contention of the learned Official Assignee is that in the instant case it cannot be said that there have been 'mutual dealings' between the insolvent and the appellants, and in the absence of such mutuality, the claim for set-off cannot be upheld. On the other hand, Mr. Sivaramakrishnaiah and Mr. Dolia, appearing for the appellants, contending *contra*, would say that the mutuality of dealings is inhered in the contract itself, and if once it is established that 'on account' the insolvent had to pay the carrier for prior carriage of goods, then such a money claim could be set-off against the value of the goods not delivered and which were admittedly handed over to the carrier for carriage by the insolvent.

11. A contract of carriage has certain peculiar ingredients in-built in it. No doubt, for all outward purposes it is a contract for the carriage of goods which were entrusted by one party to the other. But, a contract of carriage is not an equation of a contract of bailment, nor is the carrier liable as a bailee. On the other hand, there is in-built in such contracts the element of an insurance contract, for, it could reasonably be said that the carrier is equatable to an insurer who undertakes the carriage of the goods with all the attendant risks of such carriage. If, therefore, the carrier is not a bailee, but, for all legal purposes an insurer, then the question arises whether the entrustment of goods by the insolvent in the instant case was with the sole and only purpose of the return of the goods so entrusted and no more. The Official Assignee vehemently contends that the primary intention of this contract of carriage was that the carrier was expected to take the goods to the ultimate destination and if he fails to do it he is expected to return such goods *in*

specie. *Prima facie*, this argument is attractive. But, the contract of carriage, in the instant case, provides for certain terms and conditions of carriage. One such term could be extracted for the purpose of convenience and ready reference. The carrier agrees as follows:—

> "I hold myself responsible for the goods given to my care and am liable for all or any loss, damage and pilferage, caused in transit and upto the time of delivery and owing to exigencies of weather, break-down or accident, such as fire, explosion, etc., and will make good the loss sustained by your company and you can not only withhhold my transport charges, but also take such steps as you deem fit in every way to recover the loss from me which I accept to pay; in this......"

On a fair reading of this express term of the contract of carriage, it is clear that there is only a postponement of the right to recover the transport charges until the reciprocal obligation on the part of the carrier to account for the goods entrusted to him is satisfied. The contract does not even say that the transport charges are not payable if the goods are lost, but it is only to be withheld by the insolvent company until the carrier satisfactorily accounts for the goods entrusted or accounts for the loss of such goods or damage or pilferage done to it. When this is the express term of the contract, then, it is clear that the intention of the parties when they forged the contract of carriage is not only to recover the goods *in specie* if they are lost, but, alternatively also to recoup themselves with the value of such goods in case of such loss. It is this intention which ran through the fibre of this contract of carriage which was responsible for the Official Assignee when he sought for the alternative relief, in the Judge's Summons, as pointed out above earlier. It is also well accepted that once a litigant who is in the position of a plaintiff, and who is therefore, the *dominus litis* in a litigation seeks for two reliefs, one as an alternative to the other, then he cannot throw overboard such an express request made by him and in the appellate Court ask for the relief not granted to him, which as already stated, he only asked for in the alternative. We have discussed this question in detail in *Sakkubai Ammal* v. *Babu Reddiar* alias *R. B. Reddiar*[1]. We have said that 'Alternative is an expression, which indicates a choice of the person, and if that choice is exercised by him, then he cannot afterwards blow hot and cold, and sue, for reliefs as he desires by throwing overboard the benefits which he has secured on a full trial in the trial Court". The Official Assignee therefore, cannot, in the appeal before us, ask only for restitution of the goods *in specie* which was a relief which he has asked for in the alternative in the trial Court and which Court granted him the other relief of money instead of the return of the goods *in specie*. In the decree drafted as a result of this judgment of Mohan, J., both the alternative reliefs asked for have been granted. We are of the view however that having regard to the circumstances of this case the substantial relief asked for by the Official Assignee under section 7 of the Act was only for the money equivalent of the goods lost, and he cannot therefore, now at the appellate stage ask for the return of the goods *in specie*.

12. If this were the main purpose of the Judge's summons, and if the judgment and the decree which followed after investigation of the Judge's summons, was mainly for the refund of the money value of the goods entrusted to the carrier, then it is not difficult for us to hold that the dealings between the insolvent company and the carrier are mutual within the meaning of section 47 of the Act. Section 47 of the Act runs as follows:

> "Where there have been mutual dealings between an insolvent and a carrier proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from one party shall be set-off against any sum due from the other party, and the

1. (1977) 90 L.W. 110.

balance of the account, and no more, shall be claimed or paid on either side respectively:

Provided that a person shall not be entitled under this section to claim the benefits of any set off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petition by or against him."

We could do no better than to follow the apposite observations of a Division Bench of the Calcutta High Court in *Krishna Chandra* v. *Dhanathandar and Co.*[1]. After tracing the history of the section on 'mutual dealings' the learned Judges said—"This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise, the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a *pro rata* dividend only". In a case decided by the Company Court of this Court, a similar question arose—to which one of us was a party. In that case reference was made to the decision in *Sundaravaradan* v. *Official Liquidator, T. N. B: Subsidiary*[2], where Gentle, J., observed:

> "It would be very harsh if the Official Assignee or the Official Liquidator of a company could demand in full, moneys due by a debtor and at the same time that person being a creditor for an equal or a larger sum, of the company must be content with a dividend dependent on the distribution which can be made from the assets."

A reference was also made to a decision of a Division Bench of the Kerala High Court in *Gokul Chit Fund* v. *T. K. O. Vareed*[3]. We are extracting the relevant passage in that case for a continuous appreciation of the aspect we are dealing with, which is as follows:

> "The 'mutual dealings' referred to in (section 47 of) the Insolvency Act may consist of several distinct or independent transactions entered into between the same parties functioning in the same right or capacity. It is not therefore necessary that the debts or claims sought to be set off against each other should have arisen out of one and the same transaction."

Having regard to the pronouncements as above, we are of the view that the appellants are entitled to claim a set off as against the counter-claim, if we can use that expression made by the Official Assignee as against them for recovery of the value of the goods entrusted to the appellants for carriage and which have been lost or are unaccounted for by them. One interesting argument, however, which the Official Assignee raised in the course of his argument, was that the contract of carriage, notwithstanding the specific clause already excerpted by us would not enable the carrier to set off the amount due by the insolvent towards hire charges. Strong reliance is placed upon two English decisions. One is *Rose* v. *Hart*[1]. A comment on this case was made by the well known author in Williams on 'Bankruptcy', 18th Edition. Dealing with *Rose* v. *Hart*[1], the author said—

> "The previously wide interpretation of 'mutual credit' was considerably narrowed, in *Rose* v. *Hart*[1], to mean such 'credits' only as must, in their, nature terminate in 'debts' as, where a debt is due from one party and credit given by him, on the other hand, for a sum of money payable at a future day, which will then become a debt; or...."

The trend of the later decisions even in the United Kingdom when they were asked to interpret the expression 'mutual credit' was an elaborate and wide interpretation of the same. The Courts in Eng-

1. A.I.R. 1935 Cal. 225.
2. (1939) M.W.N. 1231 : A.I.R. 1940 Mad. 266.
3. (1977) 47 Comp. Cases 264 : (1976) K.L.T. 747 ; A.I.R. 1977 Kerala 68.

1. 129 E.R. 477.

land thought that it was enough that the transaction which is sought to be put against a claim so as to gain a set-off is one *which would most likely end in a debt*. Again, the learned author has incidentally referred to the right of the Official Assignee in a given case to subject the other party who is guilty to a process under the criminal law or for tort or in the alternative for damages arising out of the breach of contract. It is this which the learned author in the above edition at page 174 refers to by quoting Lord Kenyon. The quotation runs thus:

> "In *Parker* v. *Norton*, Lord Kenyon said—I understand Buller, J., to have meant this—that if a person has his election of two remedies, and may bring either trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt, if he will waive the tort."

The possibility of the two remedies based on tort as well as a claim for damages cannot co-exist. The author repeats the same principle at page 216 thus:

> "Generally a claim which is capable of being set off by one side will afford a 'mutual credit', against which the other side could, if necessary, set off their provable claims. In other words, claims must generally be within the mutual credit clause for both debtor and creditor, or for neither; and a claim cannot both be and not be subject to the mutual credit clause. But, to this rule there seems to be one exception arising from the rule that a man shall not take advantage of his own wrong. A depository without power of sale cannot, if he wrongfully sell, treat the pawnor's right to recover damages for the breach of trust as a credit by the pawnor to him; but the pawnor might nevertheless, set off the damages to which he might be entitled for the breach of trust against a credit given to him by the depository, since, if he chooses, he may waive the tort.

The learned Official Assignee is still not satisfied with the lucid explanation given by the eminent author, Williams on 'Bankruptcy', but he would refer to another decision of Lord Denning presiding in a Court of appeal in *Rolls Sewer Ltd.* v. *Cox*[1]. That was a case where the salesman was entrusted with certain machines belonging to the company which later went into liquidation. The selesman was also supplied with tap adapters which he had to return *in specie* in case the contract of employment is snapped for whatever reason it might be. It appeared that after the company went into liquidation, the liquidator sought for the return of the machinery still with the salesman and which were not sold and also for the return of the tap-adapters. Lord Denning said that the tap adapters were never entrusted to the salesman for sale—or to be turned into money, there cannot be any set-off in such circumstances. But, as regards the right of the salesman to appropriate the value of the machinery towards the salary due from the company to him, the Court of Appeal gave a right of set-off to the salesman, and in this respect, Lord Denning, did depart from the rule in *Rose* v. *Hart*[2]. The reason for the departure is obvious. If the mutual dealings between the insolvent company or an insolvent and its creditor are such that the creditor could successfully claim certain amount from the estate of the insolvent, and the insolvent in turn could ask for an account of the dealings which the insolvent had with the other party prior to the insolvency, then it is but substantial justice to uphold that they are mutual dealings capable of being set off one against the other. We have already prefaced by saying that the entire objective of section 7 of the Act which though garbed with a discretionary and a summary power, yet is expected to ensure that all the decisions which are the resultant of such investigation could render manifest and substantial justice. We have already referred to the observations of the learned Judges of the Calcutta High Court in *Krishna Chandra* v. *Dhanathandar Co.*[3].

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1. (1967) 1 A.E.R. 397: (1967) 1 Q.B.D. 522: (1967) 2 W.L.R. 241.
2. 129 E.R. 477.
3. A.I.R. 1935 Cal. 225.

We have also expressed our view that a common carrier is liable practically as an insurer of the goods. The Official Assignee had elected to have the value of the goods entrusted to the carrier and has not chosen to process the criminal law so as to book the carrier for wrongful conversion or trover. In these circumstances, we are of the view that a mutual account has to be taken as regards the dealings of one with the other. Those dealings have been scrutinised by the trial Judge in each of these appeals. We have seen that the Official Assignee is entitled to get a sum of Rs. 29,474-27 from the appellants in O.S.A. No. 50 of 1973. Similarly, the Official Assignee is entitled to obtain an amount of Rs. 1,19,398-88 together with interest from the appellant in O.S.A. No. 75 of 1975. In the former, the Official Assignee concedes that the insolvent has to pay a sum of Rs. 31,684. In the latter appeal, a similar concession is made that a sum of Rs. 1,47,592 is payable to the carrier as and towards hire charges for contracts entered into earlier between the insolvent company and the appellant carrier. One has to be set off as against the other. We, therefore, direct the Official Assignee to give credit to the sum of Rs. 31,684 towards the amount payable to him in Application No. 34 of 1972, and similarly given credit to the sum of Rs. 1,47,502, as against the amount payable to him in the decree in Application No. 513 of 1971, and after adjusting mutually the dealings in the manner indicated, claim or pay to the appellants the balance amounts in accordance with the insolvency law. The appeals are allowed. There will be no order as to costs.

R.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

P. D. Balasubramanian .. *Petitioner**

v.

The Corporation of Madras, represented by its Commissioner, Ripon Building, Madras-3 and another .. *Respondents.*

Constitution of India (1950), *Article* 226 —*Writ* of mandamus—*Petitioner Graduate Upper Division Clerk in Corporation of Madras — All departmental tests including Accounts and Revenue tests passed—Qualified for post of Assistant Revenue Officer—25 years of service and unblemished record—Not promoted to the post of Assistant Revenue Officer, for non-payment of property tax—Non-payment of property tax no ground for denial of promotion.*

Held: The impugned memo. dated 14th June, 1975 by which the petitioner was sought to be denied promotion merely because he had not paid the taxes for his properties, can have no bearing as far as his promotion is concerned. It is an irrelevant ground for denying promotion. Inasmuch as the Corporation had denied him promotion on this score it will have to consider the question of promotion without regard to his non-payment of property tax. [*Paras.* 4 *and* 5.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *mandamus* directing the first respondent to promote the petitioner to the post of the Assistant Revenue Officer in the Office of the first respondent in the vacancy that is now filled in by the 2nd respondent.

B. D. Venkataraman, for Petitioner.

* W.P. No. 4808 of 1975. *21st December, 1977.*

S. Palanisami, for Respondents.

The Court made the following

ORDER.—The petitioner was appointed as an Upper Division Clerk in the Corporation of Madras on 25th August, 1949. He is a Graduate of the Madras University. Subsequent to the appointment, he passed all the departmental tests including the Account and Revenue Tests, thereby qualifying himself for the post of an Assistant Revenue Officer, and also by his 26 years of service and unblemished record.

2. He is the owner of properties bearing premises No. 2|8 and No. 7, pereira Street, Park Town, Madras-3 within the Corporation limits. In respect of these properties, arrears of tax had fallen due. On 14th June, 1975, the following memorandum was issued to him by the Commissioner.

> "Thiru P. D. Balasubramaniam, Assessor, R.D., who is the owner of premises Nos. 2|8 and 7, Pereira Street, Dn. 40 is in arrears of property taxes amounting to Rs. 8,002.06 for the half years from 2|72.73 to 2|74.75 for the premises No. 2|8, Pereira Street, Dn. 40 and Rs. 6,462.43 for the premises No. 7, Pereira Street for the half years from 2|72.73 to 2|74.75.
>
> As an Assessor, he should have known the Rules and Regulations relating to levy and collection of property tax. It is strange that he himself is in arrears of tax.
>
> He is therefore directed to show cause within 3 days why his promotion should not be withheld for his failure to pay property taxes and setting an example to other rate payers.
>
> If no explanation is received within the time specified, it will be deemed that he has no explanation to offer and the matter will be decided on merits".

The petitioner submitted his explanation stating how the tax had fallen into arrears and urging that in any event that was not a ground on which his due promotion could be denied. Nevertheless, the second respondent was promoted over and above the petitioner. Hence, this writ petition for *mandamus* to promote the petitioner to the post of Assistant Revenue Officer.

3. In the counter of the 1st respondent, it is stated:—

> "The petitioner was not only an Assessor but entrusted with responsibilities of collecting the taxes and supervising the work of the tax collectors in the collection of taxes. The post of Assistant Revenue Officer is such that he has to collect over Rs. 60 to 65 lakhs per half year and supervise the collection work of about 20 to 25 outdoor officials engaged in out-door work, the matter of collection of property tax and other taxes and fees and also he has to supervise the work of the indoor officials, *viz.*, Section Managers, Assistant Clerks, Examiners, Posters etc. So a person to an Assistant Revenue Officer's post must have an aptitude to work hard and able to administer and be able to exercise control over the work of the officers under him. His past conduct and his inefficient work do not justify a promotion as Assistant Revenue Officer. When the petitioner was to be an example to other tax- payers, the petitioner himself has not paid his arrears inspite of repeated reminders. Though the post is by promotion, mere seniority alone cannot be taken into account. The facts as mentioned above are relevant factors and after consideration of the factors, the petitioner was not promoted as Assistant Revenue Officer and the second respondent was promoted as Assistant Revenue Officer since he had all the necessary qualifications for promotion to that post. It is deliberately false to state that it is an attempt of the first respondent who deliberately overlooking the seniority of the petitioner had promoted the second respondent".

Thus, it is stated that the refusal to promote is not arbitrary.

4. I have not the slightest hesitation in holding that absolutely on an irrelevant ground, acting highly arbitrarily, the petitioner has been denied his promo-

tion. No doubt, the counter-affidavit would state that the post of Assistant Revenue Officer is a selection post and mere seniority alone cannot count. Nevertheless, if, as seen from the impugned memo. dated 14th June, 1975 extracted above, the petitioner is sought to be denied the promotion merely because he had not paid the taxes for his properties, that can have no bearing as far as his promotion is concerned. That can hardly be a ground to deny him the promotion. Inasmuch as the respondent 1 has denied the petitioner his promotion on this score, the writ petition will have to be allowed and it is acordingly allowed.

5. However, the prayer is to direct the respondent 1 to promote the petitioner to the post of an Assistant Revenue Officer. That cannot be granted, since admittedly the said post of Assistant Revenue Officer is a selection post. Therefore, the claim of the petitioner for promotion will have to be duly considered without regard to his non-payment of property taxes. For this purpose, the matter will stand remitted to the Commissioner of Corporation.

6. I make it clear that notwithstanding the retirement of the petitioner on 31st October, 1977, his promotion shall be considered since, if he was entitled to promotion, the consequential monetary benefits would be available to him.

7. The petitioner will be entitled to his costs. Counsel's fees Rs. 250.

R.S. ——— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao, S. Natarajan and V. Balasubrahmanyan, JJ.*

The Chief Controlling Revenue Authority, Board of Revenue, Madras-5 .. *Petitioner**

v.

V. Daniel .. *Respondent.*

Stamp Act (II of 1899), section 2 (10)—Document neither ambiguous nor incomplete—Recitals in the document to be generally a safe guide for interpretation—Document whether release or conveyance.

Moneys belonging to a religious institution called the Society of Trustees which at the time was not registered and which was not formed as a Society registered under the Societies Registration Act or under any other law for the time being in force were entrusted to certain individuals for the purpose of establishing a Church and incidentally to acquire properties, both moveable and immoveable for the benefit of the said Church. One Daniel executed such a document and he was to act as one of the trustees under that instrument. Daniel released his interest in the said properties in favour of the Society which was subsequently registered and which provided the source of consideration for the purchase of the properties forming the subject-matter of the instrument and which at all material times were intended for the benefit of the Society. The recitals as such in the instrument made it clear that it was the releasee-Society which supplied the releasor with necessary consideration from the subscriptions secured by the Society for the purpose of getting the properties in issue from time to time. Two of the properties covered by the instrument were the subject-matter of a gift deed, dated 24th July, 1967 by one Jayachandra in favour of the Christian Assembly,

*R.C.No. 2 of 1976. *5th December,* 1977.

Nagarcoil, represented among others by Mr. Daniel and Brother Bhagat Singh. The second instrument was a sale deed executed in favour of the same body of Trustees. In and by the recitals, it was made clear that by the above two documents, the properties were acquired by the Christian Assembly or by the promoters for the benefit of the Society to be formed in order to ultimately benefit the Church, which the Society had to hold. The instrument also recited that the Society which was the releasee was always understood as the accredited beneficial owner of the properties and that the Society requested Mr. Daniel who was representing it to relinquish his interest and title, if any, over the properties; and the deed of release under consideration was the resultant of the mutual understanding as between the parties. The Revenue doubted in view of the recitals therein and on a reference to the earlier documents which were the subject-matter of treatment in the release deed under consideration whether the instrument in question should be treated as a bare 'release deed' or 'a conveyance' by Mr. Daniel in favour of the Society which was later registered in a manner known to law.

Held: It is by now well established that in order to interpret a document which is neither ambiguous nor incomplete the recitals in the said document ought to be generally the safe and sole guide for such interpretation. Any reliance *aliunde* on instruments other than the instruments under consideration might lead to queries which are beyond the scope of an answer to the question posed by the Revenue in a reference made to civil Court under section 58 of the Stamp Act. Where there are recitals which are clinching and telling, in the sense, that there are assertions in it to the effect that the consideration for the purchase of the properties was made by the Society which is the releasee under the instrument and that the gift was made earlier because of a voluntary effort on the part of the donor under that gift to the inchoate assembly which had no legal status by then and which was functioning under the name and style of Christian Assembly, then it would be hazardous to invoke instruments other than the instrument in question for the purpose of interpretation. That this is one of the accepted methods of interpretation has been held in a Full Bench decision in *The Chief Controlling Revenue Authority* v. *Dr. K. Manjunatha Rai*, (1976) 2 M.L.J. 279: A. I. R. 1977 Mad. 10. But this rule does not mean that the revenue is empowered to go behind recitals and terms of the document before it and hold that the object of the transaction was something different from what the document discloses and therefore the document should be deemed to be that which it is not. It cannot be held that the earlier deeds which were the basis for the acquisition of the properties dealt with under the instrument and the recitals therein could also be looked into for the purpose of understanding the true nature and contents of the document, dated 30th June, 1973 executed by Mr. Daniel in favour of the Society of Trustees of indigenous Churches in India. Viewed also from another angle, an instrument whereby a benamidar sustains and declares the interest of the real owner and puts such intention in writing and styles it as a release deed, could only be interpreted and understood as a release deed pure and simple and it cannot be a conveyance as it is popularly understood. The decision reported in *The Chief Controlling Revenue Authority* v. *M. Hamid Sultan*, (1975) 88 L.W. 27: (1975) 2 M.L.J. 36: A.I.R. 1975 Mad. 161 (F.B.), lays stress upon the well known proposition and observes that if in a given case it is proved that a transaction is a benami transaction and it satisfied the well-known tests which revolve round such transaction, it is a document whereby the benamidar concedes and accedes to the title of the real owner and it could attract duty only as a release deed and not as a conveyance.

[*Paras*. 6, 7 *and* 8.]

Held, further, that taking the recitals as a whole and accepting them as the sole guide for interpreting it, it is clear that the instrument has been correctly stamped as a release deed and it need not be stamped as a conveyance as defined in

section 2 (10) of the Indian Stamp Act. [*Para.* 10.]

Cases referred to:—

Board of Revenue v. *Dr. Manjunatha Rai,* (1976) 2 M.L.J. 279: A.I.R. 1977 Mad. 10; *Chief Controlling Revenue Authority Board* v. *Hamid Sultan,* (1975) 88 L.W. 27: (1975) 2 M.L.J. 36: A.I.R. 1975 Mad. 161.

Case referred for the orders of the High Court under section 57 of the Indian Stamp Act by the Chief Controlling Revenue Authority, Board of Revenue, Madras-5 for determination of the following question of law:

> "Whether in the circumstances and facts of the case the document, dated 30th June, 1963 (Document No. 37 of 1973 of the District Registrar's Office Nagercoil) executed by V. Daniel in favour of "The Society of Trustees of Indigenous Churches in India" represented by Brother Bakht Singh Chabra styled as a "release deed" should be termed as 'a conveyance' as defined under section 2 (10) of the Act attracting stamp duty under Article 23 of Schedule I of the Stamp Act."

K. Venkataswami, for Additional Government Pleader, for Petitioner.

P. Ramaswami, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—The question referred to us by the Chief Controlling Revenue Authority, Board of Revenue, Madras-5 is as follows:

> "Whether in the circumstances and facts of the case the document, dated 30th June, 1963 (Document No. P. 37 of 1973 of the District Registrar's Office, Nagercoil) executed by V. Daniel in favour of "The Society of Trustees of Indigenous Churches in India" represented of Brother Bakht Singh Chabra styled as a "release deed" should be termed as 'a conveyance' as defined under section 2 (10) of the Act attracting stamp duty under Article 23 of Schedule I of the Stamp Act."

2. By way of prefatory remarks, we make it clear that if the instrument in question which we are asked to interpret is to be understood as a conveyance, then it is not properly stamped, but if it is a release deed as it is styled and understood by the parties, then it has been so properly stamped.

3. For the purpose of establishing a church and incidentally to acquire properties, both movable and immovable for the benefit of the said church, moneys belonging to a religious institution called the Society of Trustees, which at that time was not registered and which was not formed as a society registered under the Societies Registration Act or under any other law for the time being in force were entrusted to certain individuals who included one Daniel who is the executant of the instrument in question. Under this instrument, Daniel is releasing his interest in the said property in favour of the Society which was later registered and which provided the source of consideration for the purchase of the property which is the subject-matter of the instrument and which at all material times was intended for the benefit of that society. It is common ground that the Society of Trustees which was not registered at or about the time when the property which was released under the instrument was acquired was later registered as "the Society of Trustees of Indigenous Churches in India" and this Society is represented by its principal trustee Brother Bakht Singh Chabra, who also functioned as one of the promoters, if such an expression could be adopted, for the purchase of property for the specific benefit of the Society to be then formed which in turn should hold the Church for whose benefit persons like Mr. Daniel and Brother Bakht Singh opted together as an inchoate congregation to secure such properties. The recitals as such in the instrument make it clear that it was the releasee, namely the Society of Trustees of Indigenous Churches in India which supplied the releasor with the necessary consideration from the subscriptions secured by the quandum Society for the purpose of buying the properties in issue from time to time. Two properties are the subject-matter of the instrument, one which was the sub-

ject-matter of a gift deed dated 24th July, 1967 by one Jayachandra in favour of the Christian Assembly, Nagercoil represented amongst others by Mr. Daniel and Brother Bakht Singh. The second instrument is a sale deed executed by one Prabhakaran Pillai in favour of the same body of trustees functioning as Christian Assembly. In and by the recitals, it was made clear that by the two documents as above, the properties were acquired by the Christian Assembly or by the promoters for the benefit of the Society to be formed in order to ultimately benefit the Church which the Society had to hold. The instrument also recites that the Society which is the releasee was always understood as the accredited beneficial owner of the properties and that the Society requested Mr. Daniel who was representing the said inchoate Society to relinquish his interest and title, if any, over the properties; and the deed of release which is under consideration by us was the resultant of that mutual understanding as between the parties.

4. The Revenue doubted that by reason of the recitals therein and on a reference to the earlier documents which were the subject-matter of the treatment in the release deed under consideration whether the instrument in question could be treated as bare release deed or a conveyance by Mr. Daniel in favour of the Society which was later registered in a manner known to law.

5. Mr. Venkataswami, the learned Additional Government Pleader would rely upon the earlier deeds under which the documents were secured. He particularly makes a reference to the gift deed dated 24th June, 1967 and the sale deed, dated 5th October, 1968 and would urge that there has been a vesting of title in a body known as Christian Assembly represented by four persons including Mr. Daniel and Brother Bakht Singh, that such title in that body could be divested only by a conveyance of that property by that body in whom the title vests and that, therefore, the present instrument cannot be accepted and interpreted as a bare release deed.

6. It is by now well-established that in order to interpret a document which is neither ambiguous nor incomplete, the recitals in the said document ought to be generally the safe and sole guide for such interpretation. Any reliance *aliunde* on instruments other than the instrument under consideration might lead to queries which are beyond the scope of an answer to the question posed by the Revenue in a reference made to civil Courts under section 58 of the Stamp Act. In a case like this where there are recitals which are clinching and even telling, in the sense, that there are assertions in it to the effect that the consideration for the purpose of the property was made by the Society which is the releasee under the instrument and that the gift was made earlier because of a voluntary effort on the part of the donor under that gift to the inchoate Assembly which had no legal status by then and which was functioning under the name and style of Christian Assembly, then it would be hazardous to indulge in an empty exercise, so as to invoke instruments other than the instrument in question for the purpose of interpretation. That this is one of the accepted methods of interpretation has been held by our Court in a Full Bench decision in *Board of Revenue* v. *Dr. Manjunatha Rai*[1]. There, the learned Judges would categorically lays down the following proposition at page 285:

> "It is true that what name the parties choose to give to an instrument cannot be decisive, or even indicative of the true nature of the instrument for purposes of stamp duty. But this rule does not mean that the revenue is empowered to go behind the recitals and terms of the document before it and hold that the object of the transaction was something different from what the document discloses and therefore the document should be deemed to be that which it is not. We do not think that the revenue authorities can ignore the terms of the document which is before them for adjudication and base their decision on the terms of some other collateral instrument......"

In the light of this and our own view expressed above, we are unable to agree

1. (1976) 2 M.L.J. 279 : A.I.R. 1977 Mad. 10.

with the learned Additional Government Pleader that the earlier instruments which were the basis for the acquisition of the properties dealt with under the instrument and the recitals therein could also be looked into for the purpose of understanding the true nature and content of the document, dated 30th June, 1973 executed by Mr. Daniel in favour of the Society of Trustees of Indigenous Churches in India.

7. Even viewing from one other angle which also deals with another well-accepted canon of law, namely, that an instrument whereby a benamidar sustains and declares the interest of the real owner and puts such intention in writing and styles it as a release deed, it could only be interpreted and understood as release deed, pure and simple and cannot be a conveyance as it is popularly understood.

8. Here again, a Full Bench of our Court in *Chief Controlling Revenue Authority Board* v. *Hamid Sultan*[1], lays stress upon the well-known proposition and observes that if in a given case it is proved that a transaction is a benami transaction and it satisfied the well-known tests which revolve round such transaction, it is a document whereby the benamidar concedes and accedes to the title of the real owner and it could attract duty only as a release deed and not as a conveyance.

9. In this case, we are not called upon to decide as suggested impliedly by the learned Government Pleader about rival claims. In fact, in answering the question posed by the Revenue under the Stamp Act, the Civil Court ought not to hazard such investigations.

10. Taking the recitals, as a whole and accepting them as the sole guide for interpretation, we are of the view that the instrument has been correctly stamped as a release deed and it need not be stamped as a conveyance as defined in section 2 (10) of the Stamp Act. The question is answered accordingly against the Revenue.

1. (1975) 88 L.W. 27: (1975) 2 M.L.J. 36: A.I.R. 1975 Mad. 161.

R.S. ——— *Answered against the Revenue.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman and V. Balasubrahmanyan, JJ.*

V. K. Abraham .. *Appellant**

v.

N. K. Abraham .. *Respondent.*

Limitation Act (XXXVI of 1963), *Article* 1 —*Mutual, open and current account—What is.*

The plaintiff was supplying stores and other materials to the defendant who was the owner of a rubber estate. The last of the dealings between the plaintiff and the defendant was on 23rd July, 1966. The plaintiff filed a suit for recovery of a sum of Rs. 46,505.67 with interest thereon on 23rd December, 1966. One of the pleas of the defendant was that the suit was barred by limitation on the ground that the account was not mutual, open and current account and Article. 1 of the Limitation Act did not apply.

Held: In order that an account might be called a mutual, open and current account, there should be independent transactions resulting in possibility of reciprocal demands and shifting balances. The entries should not be mere repayments of advances already received [*Para*. 11.]

The correspondence and the accounts showed that the transactions here falling in those categories of rubber sales, estate store supplies, and loans were clearly independent transactions in the nature of mutual, open and current account. The decision of the Court below that the suit was not barred by limitation was thus correct. [*Para*. 12.]

*A. No. 523 of 1973. 4th October, 1977.

Cases referred to:—

Hirada Basappa v. *G. Mudappa*, (1870) 6 Mad.H.C.R. 142; *Velu Pillai* v. *Ghouse Mahomed*, (1894) I.L.R. 17 Mad. 293: 4 M.L.J 140; *Tea Financing Syndicate Ltd.* v. *Chandrakamal*, (1931) I.L.R. 58 Cal. 649 : A.I.R. 1931 Cal. 359; *Hindustan Forest Company* v. *Lalchand*, 1960 S.C.J. 41: A.I.R. 1959 S.C. 1349; *Kesava Chettiar* v. *Ramanathan Mudaliar*, (1960) 1 M.L.J. 452: A.I.R. 1959 Mad. 470 ; *Gopal Chettiar* v. *Shanmuga Nadar and Brothers*, (1967) 1 M.L.J. 163 ; 79 L.W. 697: A.I.R. 1967 Mad. 360 ; *Chandradhar Goswami* v. *Ganapati Bank Ltd.*, (1967) 1 Comp. L.J. 98: (1967) 1 S.C.R. 898: A.I.R. 1967 S.C. 1058 ; *Yesu Vadian* v. *Subba Naicker*, (1919) 52 I.C. 704: A.I.R 1919 Mad. 132; *Mathilda Sice* v. *Fritz Gaeble*, A.I.R. 1926 Mad. 955; *Sundararajulu Nadar* v. *Kuppamma*, (1936) M.W.N. 472 ; *Babu Ganga Prasad* v. *Baboo Inderjit Singh*, (1875) 23 Suth. W.R. 390 (P.C.); *Kesharichand* v. *Shillong Banking Corporation Ltd.*, (1965) 1 Comp.L.J. 355; (1965) 2 S.C.J. 174: 35 Comp. Cas. 514 ; A.I.R. 1965 S.C. 1711; *Anumukonda Anjaneyalu* v. *Agricultural Traders*, A.I.R. 1973 A.P. 219.

Appeal against the decree of Subordinate Judge, Padmanabhapuram, in Orignal Suit No. 91 of 1970.

S. Padmanabhan, for Appellant.

M. Srinivasan, for Respondent.

The Judgment of the Court was delivered by

Sethuraman, *J.*—The defendant in O.S. No. 91 of 1970 in the Court of the Subordinate Judge, Padmanabhapuram, is the appellant. The plaintiff is a rubber dealer in Kulasekharam. The defendant is the owner of a rubber estate called the Cross Field Plantation at Kaliel. From the year 1963 the defendant was supplying sheet rubber as well as scrap rubber to the plaintiff from time to time. The plaintiff was also supplying estate stores and other materials. There were in addition cash transactions between the parties. The last of the dealings between the plaintiff and the defendant was on 23rd July, 1966. The defendant did not thereafter supply any rubber. The account of the defendant stood at a debit of, or overdrawn on that date by a sum of Rs. 46,505-67. The plaintiff filed the present suit for recovery of this sum along with interest at 12 per cent. per annum, after giving credit for a sum of Rs. 8,494. 20 being the amount due to the defendant's father M. K. Kuriakose on account of the price of scrap rubber supplied by him to the plaintiff. This credit entry was made on 20th April, 1968. The present suit was for recovery of Rs. 58,660 including interest and future interest and costs.

2. The defendant in his written statement stated that how the amount of the opening balance of Rs. 8,306.05 was due to the plaintiff was not clear, as the plaintiff had not produced the accounts for the year 1963-64. The defendant, therefore, reserved his right to file a detailed written statement when the particulars for the said amount were furnished by the plaintiff but he did not do so even after those accounts were filed. According to the defendant the plaintiff had not accounted for the price of the rubber properly and the plaintiff was not justified in adjusting the amount due to Kuriakose in his account. The defendant denied liability to pay interest. There was also a plea that the suit was hopelessly barred by limitation.

3. On the pleadings the following issues were framed for trial—

1. Was a sum of Rs. 8,306.05 due from the defendant to the plaintiff as on 31st December, 1965 ?

2. Has the defendant been paid the proper price for the rubber sold by him to the plaintiff?

3. Has not the entire quantity of rubber sold by the defendant to the plaintiff accounted for?

4. Was there a contract between the defendant and the plaintiff that the latter shall pay the price of rubber at the rate prevailing in the Cochin auction or Cochin market ?

5. Was the store purchase dated 7th January, 1966 on cash or on credit?

6. Has the defendant received only one of the cash payments entered on 21st January, 1966 and 22nd January, 1966 ?

7. Are the entries dated 31st January, 1966 and 8th June, 1966, by transfer of accounts from M. K. Kuriakose authorised and valid ?

8. Is the credit entry dated 20th April, 1968 by transfer of accounts from M. K. Kuriakose made on the authorisation of the defendant or whether it is a bogus entry only to save limitation ?

9. Is the interest claimed excessive?

10. What is the amount, if any, due from the defendant to the plaintiff ?

11. Reliefs and costs ?

12. Whether the plaint claim or any portion thereof is barred by limitation ?

4. The learned Subordinate Judge held on issue No. 1 that a sum of Rs. 8,306.05 was due to the plaintiff as on 31st December, 1965. On Issues Nos. 2, 3 and 4, he found that the plaintiff had credited in his account the entire quantity of rubber sold by the defendant to him and that there was no agreement between the parties for payment of the price at the rate prevailing in Cochin auction. He held on Issues Nos. 5 and 6 that the estate stores purchased by the defendant were only on credit and not for cash and that the defendant had received the amount of Rs. 1,500 each recorded in the books on 21st January. 1966 and 22nd January, 1966. On Issues Nos. 6, 7 and 8, 9, the credit for the amount due to M. K. Kuriakose given in the plaintiff's books as against the defendant was considered to be proper and interest was also held to be payable. On the question of limitation raised in Issue No. 12, the learned Subordinate Judge held that the dealings between the parties were of open, current and mutual accounts and not merely credit dealings creating obligations on one side and that the suit was within time as prescribed in Article 1 of the Limitation Act, Interest at 12 per cent, was held to be payable under Issue No. 9. The defendant challenges the decree of the learned Subordinate Judge.

5. In the present appeal Mr. S. Padmanabhan, learned counsel for the appellant, took before us only three points, *viz*:—

1. Whether the suit was barred by limitation ?

2. Whether the accounts were properly accepted as proving the transactions between the parties ? and

3. Whether the plaintiff was not entitled to any interest upto the date of the suit ?

We shall consider each one of these points.

6. In the present case the only Article of the Limitation Act to be considered is Article 1, running as follows :

Description of suit.	Period of limitation	Time from which period begins to run.
Art. 1 For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

The suit in this case was filed on 23rd December, 1969. As indicated earlier, the last of the transactions was on 23rd July, 1966. If Article 1 were to apply, then the accounts of the plaintiff having been closed at the end of the calendar year *i.e.*, 31st December, 1966, the period of limitation would end on 31st December, 1969. As the suit had been filed on 23rd December, 1969, it would be within time. The learned counsel for the appellant submitted that Article 1 cannot apply to the present case, because there is no reference in the pleadings, except in para 5. relating to the cause of action, to the accounts between the parties being mutual, open and current. In para. 1 of the plaint there is a reference to the supply of rubber and also to the payments

and to a further fact that the defendant had overdrawn a sum of Rs. 46,505.67. The accounts appear in the schedule. The substance of the para. 1 read with para. 5 of the schedule (plaint ?) does, in our opinion, indicate that the plaintiff filed the present suit on the basis of the dealings between the parties being on a mutual, open and current account. We have to look at the substance of the pleadings and an undue emphasis should not be made on the absence of use of particular expressions as if ritualistic repetition of those expressions would alone satisfy the requirements of law. The defendant had notice of the nature of the plea taken in the plaint and that is how issue No. 12 came to be discussed in the trial Court. As far as the present case is concerned, the substance of the account being mutual, open and current is brought out in para. 1 read with para. 5 of the plaint. In fact, the learned Subordinate Judge has not referred to any plea taken by the defendant in the Court below about the plaint not having referred in specific terms, except in para. 5, to the account being mutual, open and current. If such a plea had been taken, then it would have been possible for the plaintiff to consider, if necessary, amendment of the plaint. In the absence of any such plea and having regard to the manner in which the trial has gone on, we do not consider that, the appellant was justified in complaining at this stage about the absence of specific averment of the account being mutual, open and current.

7. We have now to consider the question whether the transaction between the plaintiff and the defendant can be said to fall within the category of a mutual, open and current account described in Article 1 of the Limitation Act. In *Hirada Basappa* v. *G. Mudappa*[1], Holloway Acting C.J., observed :

"To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligations."

1. (1870) 6 Mad. HCR. 142, 144.

8. In *Velu Pillai* v. *Ghouse Mahomed*[1], a Bench of this Court adopted the above passage and held that an account consisting of entries of payments made by one party in reduction of his debt to the other and of payments made by the latter on behalf of the former party for the same purpose was not a mutual account within the meaning of Article 85. It was also held that a shifting balance was a test of mutuality, but that its absence was not conclusive proof against mutuality. These decisions have formed the bedrock of the interpretation of Article 85 of the Limitation Act of 1908 in cases decided by this and other Courts. In *Tea Financing Syndicate Ltd.* v. *Chandrakamal*[2], a company advancing money by way of loans to the proprietor of a tea estate and the proprietor sending tea to the company for sale and realisations of the price were involved in a litigation in which the proprietor of the tea estate sued for recovery of the balance of the advance made after giving credit for the price realised from the sale of the tea. The question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by Article 85 of the Limitation Act. Rankin CJ., laid down at page 368 the test to be applied for deciding the question in these words.

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Holloway, Ag. CJ. transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharge of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have, therefore, to see whether under the deed the tea sent by the defendant to the plaintiff for sale, was

1. (1894) I.L.R. 17 Mad. 293 : 4 M.L.J. 140.

2. (1931) I.L.R. 58 Cal. 649 : A.I.R. 1931 Cal. 359.

sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

This passage was adopted as laying down the correct law by the Supreme Court in the *Hindustan Forest Co.* v. *Lalchand*[1]. Their Lordships pointed out that the observations of Rankin, C.J., had never been dissented from in our Courts. In the case before the Supreme Court the parties had entered into an agreement for the supply of 5,000 maunds of maize, 500 maunds of wheat and 1,000 maunds of dal at the rates and times specified. A sum of Rs. 13,000 had been paid as advance. The goods were delivered and the buyer was also making payments. The last delivery of the goods was made on 23rd June, 1947, and the suit was brought on 10th October, 1950 for the balance of the price due. The Supreme Court pointed out that what had happened was that the sellers had undertaken to make delivery of the goods and the buyer had agreed to pay for them and had in part made payments in advance. There could be no question in such a case, in their Lordships' view that the payments had been made towards the price due and there were no independent obligations on the sellers in favour of the buyer. It was also observed that if the sellers had failed to deliver the goods, they would have been liable to refund the moneys advanced and also for damages. But such liability would then have arisen from the contract and not from the fact of the advances having been made and that the buyer could not recover the moneys paid in advance. On the facts of that case, it was held that Article 115 of the Limitation Act applicable to Jammu and Kashmir corresponding to Article 85 of the Indian Limitation Act, 1908, did not apply. The Supreme Court has again applied the test laid down by Holloway Ag. C.J. In a later decision in *Keshari chand* v. *Shillong Banking Corpn. Ltd*[2].

9. Prior to the Supreme Court decision in *Hindustan Forest Co.* v. *Lalchand*,[1] another case came before a Bench of this Court in *Kesava Chettiar* v. *Ramanathan Mudaliar*[2], in which the plaintiff, a wholesale merchant carrying on business in yarn had dealings with the defendant, a retailer, in the same business. The retailer was advancing substantial sums before supplies of yarn were made by the wholesaler. Subsequent to October, 1946, payments made by the retailer to the wholesaler were mostly in the nature of payment of price for the yarn supplied. On 7th August, 1947 there was a credit balance in favour of the retailer. But after a short period of two months the retailer had again to pay further sums as against the supply of yarn. In the suit filed by the wholesaler, the question of the applicability of Article 85 of the Indian Limitation Act, 1908, came up for consideration. The following propositions were set out in that case—

"1. To constitute a mutual account between two parties, the essence of the transactions should be looked at in order to find out if independent obligations arise on both sides, resulting in possibility of reciprocal demands, even though the transactions may relate to the same commodity or to the same kind of business.

2. Before deciding whether a particular course of dealings is a continuous course of transactions independent of the other transactions involved in the case, the number of dealings do not count to decide whether the counterclaim arises upon casual transactions. The real import of the casual transactions should be taken note of in deciding the question whether they give rise to independent obligations or whether they are merely a mode of liquidation of the obligation already undertaken by the party.

3. A shifting balance may, no doubt, be a test of mutuality, but its absence

1. 1960 S.C.J. 41 : A.I.R. 1959 S.C. 1349.
2. 35 Comp. Cas 514 : (1965) 1 Comp.L.J. 355 : (1965) 2 S.C.J. 174 : A.I.R. 1965 S.C. 1711.

1. 1960 S.C.J. 41 : A.I.R. 1959 S.C. 1349
2. (1960) 1 M.L.J. 452 : A.I.R. 1959 Mad. 470.

cannot be taken to be conclusive proof against mutuality. The real point to be noticed is not whether balances actually shifted but whether the nature of the transactions was such that it was capable of giving rise to shifting balances.

4. The absence of actual reciprocal demands would not matter, because the point to be considered is whether such demands were capable of being made on the account by one party upon the other."

A learned single Judge of the Andhra Pradesh High Court in *Anumukonda Anjaneyalu* v. *Agricultural Traders*[1], has doubted the correctness of this decision in the light of the decision of the Supreme Court in *Hindustan Forest Co.* v. *Lalchand*[2]. Whatever may be the justification for this criticism, with reference to the conclusion on facts, we do not find that any one of the propositions extracted above is open to question or is in conflict with any authority. We consider that these propositions do continue to be valid notwithstanding any doubt about the correctness of the actual decision in that case.

10. We may note in passing that this Court again applied the dictum of Holloway, Ag.C.J. and followed the decision of the Supreme Court in *Hindusthan Forest Co.* v. *Lalchand*[2] in *Gopal Chettiar* v. *Shanmuga Nadar and Bros.*[3]

11. Briefly stated in order that an account may be called a mutual, open and current account, there must be independent transactions resulting in possibility of reciprocal demands and shifting balances. The entries should not be mere repayments of advances already received. The accounts must be open and continuing. Examined in this light, we consider that the account between the plaintiff and the defendant here can be said to be a mutual, open and current account. The plaintiff has been paying moneys from time to time as required by the defendant and the payments were not actually advances against future supplies. The plaintiff has been supplying estate stores for which the defendant had to pay and these supplies were not intended to square up even in part the value of rubber supplied. The defendant on his part was supplying the rubber to the plaintiff.

12. The defendant has been asking for amounts not necessarily as advance for the supply of rubber. For instance in Exhibit A-54, dated 18th October, 1965, the defendant has asked for a sum of Rupees 10,000 being sent per bearer as he was urgently in need of that amount. He does not say that this amount was needed as and by way of any advance or towards any particular supply of rubber. Similarly in Exhibit A-129 the defendant had asked for "Carboyot formic acid", being sent per bearer. The plaintiff sent it and had to recover the amount due therefor. There are similar items of stores required by the defendant for which indent was made to the plaintiff. There are certain other transactions in which the defendant has stated that the amount could be adjusted against the rubber to be delivered. In one of the letters the defendant has acknowledged the receipt of some manure and has asked for a sum of Rs. 2,000 being sent per bearer, one Padmanabha Pillai. It was mentioned that this amount could be adjusted by next week. He has also asked for another load of rubber mixture by 18th July and stated that the amount could be adjusted by two weeks. There were repayments by the defendant in cash on 27th November, 1964 and 24th December, 1965. The correspondence and the accounts go to show that the transactions here falling in those categories of rubber sales, estate store supplies, and loans are clearly independent transactions in the nature of a mutual, open and current account. The decision of the Court below that the suit is not barred by limitation is thus correct.

13. The second point taken by the learned counsel for the appellant was that the accounts themselves should not have been accepted without examining the scribe and without any proof to

1. A.I.R. 1973 A.P. 219.
2. 1960 S.C.J. 4 : A.I.R. 1959 S.C. 1349.
3. (1967) 1 Mad.L.J. 163: 79 L.W. 697: A.I.R. 1967 Mad. 360.

show that the entries represented real transactions. For this purpose reliance was placed on section 34 of the Indian Evidence Act and also some decisions to be noticed presently. Section 34 runs as follows:—

> "34. Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

The illustration appended to that provision runs as follows—

> "*A* sues *B* for Rs. 1,000 and shows entries in his account books showing *B* to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt."

The Supreme Court has pointed out in *Chandradhar Goswami* v. *Ganpati Bank Ltd.*[1] as follows:

> "The original entries alone under section 34 of the Evidence Act would not be sufficient to charge any person with liability........Therefore, where the entries are not admitted it is the duty of the Bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated, therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the bas is of mere entries whether the entries produced are the original entries or copies under section 4 of the Bankers' Books Evidence Act."

In relation to the question of the standard of proof expected in a case like this, our attention was drawn to a few decisions of this Court. In *Yesu Vadian* v. *Subba Naicker*[2] it was held as follows:

> "Section 34 of the Evidence Act lays down that the entries in books of account, regularly kept in the course of business, are relevant, but such a statement will not alone be sufficient to charge any person with liability, that merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The Legislature, however, does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in the books of account, if true."

14. In *Mathilda Sice* v. *Fritz Gaebele*[1] it was observed as follows:

> "There is no doubt that merely putting forward accounts is of no use whatever. They must be supported by some other evidence, which the Court believes..........I take it that the law requires proof not only of account books generally but of each item, that is, in the interest of the person producing the books, but with regard to admissions, *i.e.*, entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer".

15. In *Sundararajulu Nadar* v. *Kuppammal alias Bhagirathi*[2], a learned Judge of this Court sitting singly observed as follows:—

> "The entries in the account books do not prove themselves, they are at most when proved, corroborative

1. (1967) 1 Comp.L.J. 98 : (1967) 1 S.C.R. 898 : A.I.R. 1967 S.C. 1058.
2. (1919) 52 Ind.Cas. 704 : A.I.R. 1919 Mad. 132.

1. A.I.R. 1926 Mad. 955 at p. 957.
2. 1936 Mad. W.N. 472.

evidence.— See *Babu Ganga Prasad* v. *Boboo Inderjit Singh*[1], and unless there is proof that the entries represent real transactions, they will not suffice to charge any person with liability thereunder."

The effect of the decisions is that the account books are not by themselves sufficient to charge any person with liability, that the plaintiff has to show by some independent evidence that the entries in his books represented real and honest transactions and that the moneys paid or the transactions took place in accordance with those entries.

16. In the present case, the plaintiff has examined himself as P.W. 1. He has spoken in substance to the transactions having taken place in the manner recorded in the books. We do not consider that there is any deficiency in the matter of corroboration of the entries in the books as required by section 34 of the Evidence Act. The defendant did not produce any books of account, which he admittedly maintained on some pretext or other. The learned counsel for the appellant stated that the failure of the defendant to produce his books had absolutely no effect in a case like this. According to him, he can rely on the failure of the plaintiff to prove his case. Even on the footing that the defendant's failure to produce the books admittedly maintained has no significance, we consider that on the facts the plaintiff had established the correctness of his account books and spoken to the reality of the entries and the transactions. The plaintiff was carrying on his business as an individual. Though occasionally he may not have been present when some particular transactions took place, still there is no gainsaying the fact that he knew all the transactions that took place between him and the defendant. His evidence, in our opinion, is satisfactory to establish the correctness of the entries in his books. There is, therefore, no error committed by the learned Subordinate Judge in holding that the amount claimed by the plaintiff was due to him.

17. The last point is regarding the liability of the defendant to pay interest on the amount due by him. The defendant has stated in his deposition as D.W. 1 that there was no agreement to pay interest on the outstanding balance and that there was no practice also to charge interest. In cross-examination he only says that he did not know whether there was business practice to pay interest on the outstandings upto 18 per cent. The plaintiff in his deposition has stated that there was no agreement in writing for payment of interest and that he claimed the interest as per business custom. The plaintiff has been charging interest at 12 per cent. per annum at the close of each year, as against his other customers. The learned Subordinate Judge in para. 21 of his judgment has catalogued the instances in which the plaintiff has charged interest. We also consider it has been established in the present case by the accounts maintained by the plaintiff himself and there is no evidence to the contrary. The charging of interest at 12 per cent. per annum cannot also be considered to be unreasonable or excessive. It may also be pointed out that the only issue on interest is issue No. 9 running as follows:—

"9. Is the interest claimed excessive?"

The liability to pay interest was thus not put in issue. The only question was about the rate of interest. The rate of interest at 12 per cent. per annum cannot be considered to be excessive. We do not, therefore, see any reason to interfere with the judgment of the learned Subordinate Judge on this point also.

18. In the result, the appeal is dismissed with costs.

S.J. ——— *Appeal dismissed.*

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1. (1875) 23 Suth.W.R. 390 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS,

PRESENT:—*P. Govindan Nair, CJ.* and *V. Ramaswami, J.*

P.V. Mohammed Ghouse .. *Appellant**

v.

State of Tamil Nadu, represented by the Collector of Ramanathapuram and another .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 4 (1), 5 (*A*), 6 *and* 17 (1), (2) *and* (4)—*Applicability—Notification under section* 4 (1), *the direction and the declaration—Simultaneous publication—Proceedings liable to be quashed.*

Section 17 (4) of the Land Acquisition Act gives a power to the appropriate Government to direct that the provisions of section 5-A shall not apply in cases where sub-section (1) of section 17 is attracted. It has to be borne in mind that the power can be exercised, "only in cases of urgency". The words in quotation are the words with which sub-section (1) of section 17 commences. The power under sub-section (4) of section 17 cannot, therefore, be applied when there is no urgency. Secondly, it is necessary to apply the mind to the question whether in a given case the power under section 17 (4) can appropriately be applied and reasonably be applied, for, whenever the power under sub-section (4) of section 17 is applied, the right given under section 5-A of Act I of 1894 to the owner of the land to make representation against the proposed acquisition, is taken away. That such a right is a very valuable right has also been laid down in a number of judicial decisions. The application of the mind, therefore, must be to the various aspects as to whether it is just and proper that such a right should be taken away and further whether it is necessary to take away that right in order that the urgency may be satisfied. If it is reasonably possible to give a right to the owner of the land to state his case and to consider the same and then to decide whether the land should be acquired and thereafter the declaration under section 6 made; then in such circumstances there will be no justification whatever in pressing into service the extraordinary powers under sub-section (4) of section 17. Under the provisions of section 17 the power is given for rare use in circumstances where, without the use of that power, the purpose of public need cannot be met. The procedure adopted would indicate whether there was any such extreme or dire need for dispensing with the right of the owner of the land and in proceeding with the declaration containing dispensation of the enquiry under section 5-A.

[*Para.* 6]

Sub-section (4) of section 17, clearly states that the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1). In this case, the notification under section 4 (1), the direction and the declaration have all have been simultaneously published on 20th July, 1977. This is scant respect to the statutory provisions and the rule of law as embodied therein. Apart from this consideration there is another fundamental aspect; section 17 (2) does not contemplate the application of section 17 (4) for purposes of the acquisition as stated in the notification under section 4 (1) in this case. This clearly indicates that there has been no application of the mind to section 17, at all, before wielding the heavy weapon given to the Authority under section 17 (4). Such an action borders on arbitrariness if not on perversity.

[*Para.* 8]

Held that interests of justice demand that the notification, dated 28th June, 1977, must be quashed *in toto*, that is, as far as the declaration portion is concerned and so also the dispensing with the enquiry under section 5-A is concerned.

[*Para* 8.]

Case referred to:—

Damodara Menon v. *P.A. (L.A.) to District Collector*, (1975) K.L.T. 537.

*W.A. No. 592 of 1977. *5th January*, 1978.

Appeal under clause 15 of the Letters Patent against the order the Honourable Justice Mohan, dated 24th December, 1977, and made in the exercise of the Special Original Jurisdiction of the High Court in W. P. No. 3281 of 1977 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* filed *mandamus*, calling for the records of the respondent 2 in their proceedings in G.O. Ms. No. 989, P.W. (General), dated 28th June, 1977, of the 2nd respondent and quash the same as illegal and direct the respondents to conduct proceedings under section 5-A of the Land Acquisition Act I of 1894.

G. Gopalaswami and *R. Sukantharaj*, for Appellant.

G. Chinnaswami, for Government Pleader, for Respondents.

The order of the Court was made by

Govindan Nair, CJ.—This appeal is against the order in W.P. No. 3281 of 1977 dismissing the writ petition *in limine*. The prayer in the writ petition is "to call for the records of the respondents in their proceedings in Roc. in G.O. Ms. No. 989 (P.W.) General" dated 28th June, 1977 of the 2nd respondent and quash the same as illegal and direct the respondents to conduct proceedings under section 5-A of the Land Acquisition Act (I of 1894) by issue a writ of *certiorari* filed *mandamus* or any other appropriate writ, direction or order as this Honourable Court may deem fit and proper in the interest of justice".

2. The notification referred to is seen at page 7 of the typed set of papers. In the third paragraph it states:

"Whereas it has become necessary to acquire the immediate possession of the land specified in the schedule below, the Government of Tamil Nadu hereby directs that the land be acquired under the provisions of sub-section (2) of section 17 of the said Act."

3. The notification under section 4 (1) is dated 22nd March, 1977. The declaration which also contains the dispensation of the enquiry which we have just now read, is dated 28th June, 1977. The notification under section 4 (1) and the declaration under section 6 were published in the Gazette on 20th July, 1977.

4. Counsel on behelf of the appellant contended before us that the facts as indicated by the dates of the notification and the declaration and the publication thereof clearly belies any urgency or emergency which would justify the application of section 17 (2) of the Act. Section 17 (2) of the Land Acquisition Act, (I of 1894) has been amended by the State Legislature by Madras Act (XXI of 1948). The following sub-section (2). has been substituted in the first paragraph of sub-section (2). The amended section reads as follows:

"(2) In the following cases, that is to say......(*a*) whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a riverside or ghat station, or of providving a convenient connection with or access to any such station,

(*b*) Whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land ......

(*i*) for the purpose of any library or educational institution, or

(*ii*) for the construction, extension or improvement of ......

(*A*) any building or other structure in any village for the common use of the inhabitants of such village, or

(*B*) any godown for any society registered or deemed to be registered under the Madras Co-operative Societies Act, 1932, or

(*C*) any dwelling house for the poor, or

(*D*) any irrigation tank, irrigation or drainage channel or any well, or

(*E*) any road

the Collector, may, immediately after the publication of the notice mentioned

in sub-section (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances."

5. The question that had often arisen in what circumstances the power under section 17 (4) can be applied legitimately had come up for consideration in a number of decisions. Sub-section (4) states that "in the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1)."

6. Though the wording of the section gives a power to the appropriate Government to direct that the provisions of section 5-A shall not apply in cases where sub-section (1) of section 17 is attracted it has to be borne in mind that the power can be exercised "only in cases of urgency". The words in quotation are the words with which sub-section (1) of section 17 commences. The power under sub-section (4) of section 17 cannot, therefore, be applied when there is no urgency. Secondly, it is necessary to apply the mind to the question whether in a given case the power under section 17 (4) can appropriately be applied and reasonably be applied, for, whenever the power under sub-section (4) of section 17 is applied, the right given under section 5-A of Act 1 of 1894 to the owner of the land to make representation against the proposed acquisition, is taken away. That such a right is a very valuable right has also been laid down in a number of judicial decisions. It is unnecessary to refer to them, for the principle is very well established. The application of the mind, therefore, must be to the various aspects as to whether it is just and proper that such a right should be taken away and further whether it is necessary to take away that right in order that the urgency may be satisfied. It is reasonably possible to give a right to the owner of the land to state his case and to consider the same and then to decide whether the land should be acquired and thereafter the declaration under section 6 made, then in such circumstances there will be no justification whatever in pressing into service the extraordinary powers under sub-section (4) of section 17. As we understand the provisions of section 17 the power is given for rare use in circumstances where, without the use of that power, the purpose of public need cannot be met. The procedure adopted would indicate whether there was any such extreme or dire need for dispensing with the right of the owner of the land and in proceeding with the declaration containing dispensation of the enquiry under section 5-A.

7. The matter has been dealt with elaborately in a judgment of the Kerala High Court in the decision reported in *Damodara Menon* v. *P.A. (L.A.) to Dist. Collector.*[1] After a review of the relevant authorities the principle has been laid down that if the procedure adopted belies the story of an extreme urgency as the foundation for the action for dispensing with the enquiry, then the procedure would not be justified under the statute and the Court sitting under Article 226 of the Constitution can set aside the proceedings by appropriate directions or orders.

8. We have already adverted to the date of the notification under section 4 (1) and the date of publication of that notification. We shall repeat that the notification is dated 22nd March, 1977, whereas it was published only on 20th July, 1977, Sub-section (4) of section 17, which we have referred to in detail, clearly states that the appropriate Government may direct that the provisions of section 5-A shall not apply, and, if it does so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1). In this case, the notification under section 4 (1), the direction and the declaration have all been simultaneously published on 20th July, 1977. This is scant respect to the

1. (1975) K.L.T. 537.

statutory provisions and the rule of law as embodied therein. Apart from this consideration there is another fundamental aspect, section 17 (2) does not contemplate the application of section 17 (4) for purposes of the acquisition as stated in the notification under section 4 (1) in this case. This merely indicates that there has been no application of the mind to section 17, at all, before wielding the heavy weapon given to the authority under section 17 (4). Such an action borders on arbitrariness if not on perversity. In such circumstances, we are constrained to interfere by issue of necessary directions. We consider that interests of justice demand that the notification dated 28th June, 1977, which is at page 7 of the typed set of papers, must be quashed *in toto*, that is, as far as the declaration portion is concerned and so also the dispensing with the enquiry under section 5-A is concerned. We do so.

9. We are informed by the counsel on behalf of the State that possession had already been taken pursuant to these proceedings, on 31st August, 1977. In view of the quashing of the declaration, it is necessary that possession must be handed over to the appellant; we direct that this should be done immediately.

10. Before parting with this case, we would like to record that counsel for the appellant stated that he has no objection to 75 cents of land being taken from the portion of the land lying away from the road and that he has no objection to the whole of that 75 cents being taken and he only wants his interest being safeguarded. The portion lying adjacent to the road it is said is necessary for the purpose of opening a Cinema Theatre which he proposes to do. It is not disputed that only 75 cents is required for the purpose for which public acquisition was resorted to. In the light of these statements made by counsel on behalf of the appellant, it seems to us to be possible to have the enquiry concluded without any delay, because the land is available to the Government and only its location need be determined.

11. We direct that notice be given of the enquiry and the appellant given an opportunity to state his case and his claim that the acquisition be confined o the back portion, that is, the portion lying away from the road be considered. The authority conducting the enquiry should apply his mind to this question and pass proper orders before proceeding further with the acquisition proposed.

12. The writ appeal is disposed of on the above terms. We direct the parties to bear their respective costs.

R.S. ——— *Directions given.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Lakshmana Chetty .. *Petitioner**

v.

M.S. Askar Ahmed and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10 (2)—Suit on promissory note—Assignor-original-payee of the promissory note, if a proper party.

Held, that an assignor-original-payee of a promissory note is a proper party to the action laid on the promissory note. [*Para* 3]

Cases referred to:—

P.S. Pattabiramvn v. *Ganapathy*, (1962) 1 M.L.J. 246: A.I.R. 1962 Mad. 202; *Rudrappa Chetty* v. *Narasimha Chetty*, (1965) 78 L.W. 524: (1965) 2 M.L.J. 160: A.I.R. 1965 Mad. 495; *Thambuswami Reddiar* v. *Chidambarm Pillai*, (1954) 2 M.L.J. 322: 67 L.W. 1139: A.I.R. 1954 Mad. 960; *Uthaman Chettiar* v. *Thiagaraja Pillai*, (1955) 68 L.W. 810: A.I.R. 1956 Mad. 155; *Rangaswamy Koundar* v. *Ramaswamy Koundar*, (1971) 84 L.W. 25: A.I.R. 1971 Mad. 328.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Vellore, dated 1st August, 1974 and made in I.A. No. 679 of 1974 in O.S.No. 193 of 1973.

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*C.R.P. No. 328 of 1975. 23*rd January*, 1978.

K. Alagiriswami and *R. Subbaraj*, for Petitioner.

Ikram Mohamed and *K. Ramachandran*, for Respondent.

The Court made the following

ORDER.—The defendant in O.S. No. 183 of 1973 on the file of the Court of the Subordinate Judge of Vellore is the petitioner. The first respondent filed a suit to recover the amount due on a promissory note dated 12th February, 1970, executed by the defendant in favour of the second respondent, *viz.*, Abdulla Basha Sahib. The second respondent is said to have assigned the said promissory note in favour of the first respondent on 23rd April, 1973. The defendant filed a written statement contending that the promissory note was executed towards the sale consideration of a sale deed dated 11th February, 1970, and since he could not get possession and he was injuncted by the Court from taking possession the consideration on the promissory note must be deemed to have failed and in any event the plaintiff is not a holder in due course. On the basis of the above facts, issues were framed and issues 1 to 3, read as follows:

(1) Whether the suit pro-note was executed for the purchase of the property as alleged by the defendant?

(2) Whether the agreement between the original payee and the defendant as pleaded by the defendant is true, valid and enforceable?

(3) Whether the assignment of the pronote in favour of the plaintiff is not valid?

2. The defendant filed I.A. No. 679 of 1974 under Order 1, rule 10 (2) of the C.P. Code to implead the original payee-assignor as a party defendant to the suit. This was resisted both by the plaintiff and the proposed party. The learned Subordinate Judge of Vellore dismissed the application on the ground that he is neither a necessary nor a proper party.

3. On the facts of the case, I feel that there is justification for adding the proposed party to this action. That the assignor-original-payee of the promissory note is a proper party to the action laid on a promissory note, has been recognised by this Court in a number of cases. This has been laid down in *P.S. Pattabiraman* v. *Ganapathy*[1], in *Rudrappa Chetty* v. *Narasimha Chetty*[2] in *Thambuswami Reddiar* v. *Chidambara Pillai*[3] in *Kannammal and another* v. *Prema and others* (C. R. P. No. 1100 of 1974) and in *K. Madhavan* v. *Santhi B. Mani and others* (C.R.P. No. 1857 of 1973).

4. Thiru K. Ramachandran, learned counsel for the proposed party relies on the ratio in *Uthaman Chettiar* v. *Thiagaraja Pillai*.[4] I find that the facts are different and the said ratio cannot be relied upon to negative the claim of the defendant to add the original payee-assignor of the promissory note to this action. Ramanujam, J., in *Rangaswamy Koundar* v. *Ramaswamy Koundar*[5] considered the above ratio in the light of the later decisions and held that the said ratio is no longer good law. I find that the suit is of the year 1973 and I direct the Court below to take up the matter and dispose of the same expeditiously and in any event before the end of August, 1979.

R. S.

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1. (1962) 1 M.L.J. 246: A.I.R. 1962 Mad. 202
2. (1965) 78 L.W. 524: (1965) 2 M.L.J. 160: A.I.R. 1965 Mad. 495.
3. (1954) 2 M.L.J. 322: 67 L.W. 1139: A.I.R. 1954 Mad. 960.
4. (1955) 68 L.W. 810: A.I.R. 1956 Mad. 155.
5. (1971) 84 L.W. 25: A.I.R. 1971 Mad. 328

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

H.L. Nantha .. *Petitioner**

v.

T.C. Ramalingam Pillai .. *Respondent.*

Civil Procedure Code (*V of* 1908), *as amended by Central Act* (CIV *of* 1976), *Order* 21, *rule* 29—*Scope and applicability.*

As a result of the amendment of Order 21, rule 29, Civil Procedure Code, by the Central Act CIV of 1976, the Court acquires the competency to stay not only a decree which it passed, but also a decree which had been transferred to it for execution, though passed by another Court.

[*Para.* 2]

Petition under section 115 Act (V of 1908) praying the High Court to revise the Order of the Court of the District Munsif, Tenkasi, dated 21st July, 1977, and made in E.A. No. 128 of 1976 in O.S. No. 20 of 1974.

M.B. Dominique, for Petitioner.

V. Ratnam, for Respondent.

The Court made the following

ORDER:—This is a petition to revise the order of the learned District Munsif of Tenkasi dated 21st July, 1977, in E.A. No. 128 of 1876 in O.S. No. 20 of 1974. Admittedly certain suits instituted by the petitioner against the respondent on the file of the Court of the District Munsif of Tenkasi are pending. Equally admittedly the respondent had obtained a decree against the petitioner in O.S. No. 20 of 1974 on the file of the Sub-Court, Tirunelveli. It is not again disputed that the decree in O.S. No. 20 of 1974, on the file of the Sub-Court, Tirunelveli, had been transferred for execution to the Court of the District Munsif, Tenkasi. The consequence is that before the District Munsif, Tenkasi, are pending the suits filed by the petitioner against the respondent herein and the execution proceedings in O.S. No. 20 of 1974. It is against the background of these facts, the petitioner filed E.A. No. 128 of 1976 under Order 21, rule 29, C.P. Code, for stay of execution proceedings in O.S. No. 20 of 1974. The learned District Munsif by the impugned order dismissed the application. Hence the civil revision petition.

2. The sole ground on which the learned District Munsif dismissed the execution application filed by the revision petitioner is that the decree in O.S. No. 20 of 1974, on the file of the Sub-Court, Tirunelveli, was not passed by the District Munsif and therefore he had no competency to stay the execution proceedings of that decree. In coming to this conclusion, obviously the learned District Munsif has overlooked the amendment made in Order 21, rule 29, C.P. Code, by Central Act (CIV of 1976). After the amendment, Order 21, rule 29, reads as follows:

"Where a suit is pending in any Court against the holder of a decree of such Court or of a decree which is being executed by such Court on the part of the person against when the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided:

Provided that if the decree is one for payment of money, the Court shall, if it grants stay without requiring security, record its reasons for so doing."

As a result of the amendment, the Court acquires competency to stay not only the decree which it passed, but also the decree which had been transferred to it for execution, though passed by another Court. The learned District Munsif failed to take note of this important change made in the relevant provisions of the Civil Procedure Code. Hence, the civil revision petition is allowed, the order passed by the learned District Munsif is set aside and the learned District Munsif is directed to dispose of E.A. No. 128 of 1976 on merits on

*C.R.P. No. 2041 of 1977.

24th February, 1978.

the basis that he has the jurisdiction to stay the execution of the decree in O.S. No. 20 of 1974 because that decree had been transferred to his Court for execution. There will be no order as to costs in this petition.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M.M. Ismail, J.*

The State Trading Corporation of India Limited ..*Petitioner**

v.

K. V. Vaidyalingam and others ..*Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10 and Order 22, rule 4—Suit against four defendants—Fourth defendant dead even on the date of filing of the suit—Legal representatives could not be added—Suit against a dead person a nullity.

A suit was filed on 3rd November, 1975 against five defendants while the fourth defendant had died even on 19th August, 1975. Consequently the suit was filed against a dead person as far as the fourth defendant was concerned. A suit against a dead person is admittedly a nullity. Therefore as far as the fourth defendant was concerned it was as if no suit whatever had been filed. If so, as Order 22, rule 4, Civil Procedure Code, cannot be invoked for the purpose of impleading the legal representatives of the fourth defendant as parties to the suit.

[*Para.* 2]

It is one thing to file an application to implead certain parties as to a suit in the place of a deceased party under Order 22, rule 4, Civil Procedure Code, and it is entirely another thing to file an application to implead a new party, because the rights of parties will not be the same. When a legal representative is brought on record under Order 22, rule 4 of the Code his status and rights will be the same as that of the person who died in whose place he has come on record, while the right and obligation of a person impleaded as a party under Order 1, rule 10, Civil Procedure Code, will not be so circumscribed but will be different and independent.

[*Para.* 3]

Case referred to:

K. Ismail v. *Pavu Ammal* (1955) 2 M.L.J. 184: 68 L.W. 500: A.I.R. 1955 Mad. 644.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the First Additional Subordinate Judge, Coimbatore, dated 14th March, 1977, and made in I.A. No. 736 of 1976 in O.S. No. 720 of 1975.

R. Subramaniam, for *M/s. King and Patridge,* for Petitioner.

The Court made the following

ORDER.—The petitioner who was the plaintiff in O.S. No. 720 of 1975 on the file of the learned First Additional Subordinate Judge of Coimbatore instituted the suit against five defendants, and the fourth defendant was dead even on the date when the suit was instituted. Subsequently, the petitioner filed I.A. No. 736 of 1976 under Order 22, rule 4 and section 151 of the Code of Civil Procedure to implead the legal representatives of the said fourth defendant. On that application being opposed, the trial Court dismissed the same. It is against the dismissal of the said application, the present civil revision petition has been filed.

2. The suit was filed on 3rd November, 1975, while the fourth defendant had died even on 19th August, 19'5. Consequently, the suit was filed against a dead person as far as the fourth defendant was concerned. A suit against a dead person is admittedly a nullity. Therefore, as far as the fourth defendant was concerned, it was as i' no suit whatever had been filed. If so, Order 22, rule 4, C.P. Code, cannot be invoked for the purpose of impleading the legal representatives of the fourth defendant as parties to the suit.

*C.R.P. No. 2648 of 1977. 16*th December*, 1977.

3. The learned counsel for the petitioner, relying on the decision of this Court in *K. Ismail* v. *Pavu Ammal*[1] contends that these persons could be impleaded under Order 1, rule 10 of the C.P. Code. But that was not the claim of the petitioner herein. It is one thing to file an application to implead certain person as parties to a suit in the place of a deceased party under Order 22, rule 4, C.P. Code, and it is entirely another thing to file an application under Order 1, rule 10 to implead a new party, because the rights of the parties will not be the same. When a legal representative is brought on record under Order 22, rule 4, C.P. Code, his status and rights will be the same as that of the person who died in whose place he has come on record, while the rights and obligations of a person impleaded as a party under Order 1, rule 10, C.P. Code, will not be so circumscribed, but will be different and independent. Therefore, I am unable to accept the contention of the learned counsel for the petitioner that the proposed parties could be impleaded under Order 1, rule 10, C.P. Code, and the suit itself must be deemed to have been instituted against them. Hence the civil revision petition fails and the same is dismissed.

R.S. —— *Revision dismissed.*

1. (1955) 2 M.L.J. 184: 68 L.W. 500: A.I.R. 1955 Mad. 644.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Suryamurthy, JJ.*

Canara Bank, Madras .. *Appellant**

v.

Indian Bank, Madras and another .. *Respondents.*

Pledge or hypothecation.— Company borrowing money from two banks on hypothecation of same stocks — Subsequently company ordered to be wound-up—One bank claiming priority of claim on basis of date of hypothecation—Both transactions found to be a fraud on the part of the Managing Director — Sale proceeds of the stocks to be divided pari passu *between the two banks in proportion to the amount due to each of them.*

The managing director of a company borrowed money from 'I' Bank on 30th November, 1959 by hypothecating the stocks of the company. Subsequently, he also borrowed money from 'C' Bank by hypothecating the same stocks. Later, the company was ordered to be wound-up by the Court. The official liquidator sold the stocks and invested the money as per directions of the Court. 'I' Bank claimed priority over the sale proceeds on the ground that its contract was earlier. This was contested by 'C' Bank on the ground that both transactions were a result of forgery committed by the Managing Director and that 'I' Bank could not claim any priority and that there should be equitable adjustment.

Held: Applying the principle adopted in Original Suit Appeal No. 9 of 1960 (by the Madras High Court), the official liquidator was directed to divide the sale proceeds *pari passu* between the two banks, in proportion to the amount due to each of them. [*Para. 7.*]

* O.S.A.No. 39 of 1975

15th June, 1977.

Case referred to:—

Official Liquidator v. *Commissioner of Police*, (1969) I.L.R. 2 Mad. 559.

Appeal under clause 15 of the Letters Patent against the order of Paul, J., dated 27th March, 1974 in Civil Petition No. 21 of 1961, Application No. 332 of 1972.

V. S. Subramanian, for Appellant.

S. P. L. Palaniappa and *Srinivasan*, for Respondent.

The Order of the Court was made by

Ramaprasada Rao, J.—The controversy in this appeal is due to conflicting claims made by the Indian Bank, Madras and the Canara Bank, Madras, both of which are as on date nationalised banks. Manasuba and Co., (P.) Ltd., (in liquidation), was admittedly functioning under the managing directorship of one C. V. Raman who, as is not disputed before us, was the ace-mover of this company and the author of the various transactions in which this company was involved. It is common ground that on representations which ultimately turned out to be false and fraudulent, the managing director, C. V. Raman who was dealt with under the criminal law borrowed almost simultaneously on the hypothecation or pledge of the same goods in the same godown from both the banks as above. The *modus operandi* by which the managing director was acting was noticed by this Court in an earlier case reported in *Official Liquidator* v. *Commissioner of Police*[1], and it is unnecessary to recapitulate the misconduct of the said managing director in the matter of borrowing on behalf of the company and on representations which were ultimately found to be false and false to his knowledge. In fact, he has forged the signatures of the other directors while attempting to borrow from the Banking institutions. The same methodology was adopted by him when he attempted to borrow from the two banks as above on the hypothecation of stocks of timber stored at the open godowns at No. 84, Sydenhams Road, Madras-7 and at block No. 7, Edward Textiles, No. 2, De Mellos Road, Madras-7. On 30th November, 1959, the Company in liquidation through its managing director C. V. Raman borrowed moneys on open cash credit account with the Indian Bank, and as collateral security for the re-payment of the amount that might fall due under the said account, the company through C. V. Raman executed an agreement of that date. Clauses 1 and 4 of the said agreement are relevant for our purpose and they are extracted hereunder;

> "*Clause* 1: That the goods, produce and merchandise mentioned in schedule hereto which have been already deposited and the goods produce and merchandise which shall be hereafter deposited with the bank under this agreement shall be placed in the bank's possession and control, such possession to be apparent and indisputable, and the same respectively are and shall be hereby pledged, and shall stand pledged and shall be deemed to always stand pledged to the Bank as security for the payment to the Bank of the balance of the said cash credit account on demand by the bank at any time".

> *Clause* 4: That a register of the goods, produce and merchandise pledged as such security as aforesaid shall be kept by the borowers and be at all times open to the inspection of the bank, in which shall be entered particulars of all goods, produce and merchandise pledged to the Bank under this agreement and all the goods and merchandise released and withdrawn. The borrowers shall furnish to the bank daily or at such intervals as the Bank may require a schedule or copy, of all the entries which shall have been made in the said register on the previous day or a daily statement of the stock which stands pledged to the bank and as contained in the said register at the close of the previous day and duly certified under the signature of the borrowers. The statement of stock held by

1. (1969) I.L.R. 2 Mad. 559.

the borrowers, as agents for the bank returned from time to time is in the nature of rendering of account by agent to principal and the statements so submitted shall be returns of the borrowers in their capacity as agents for holding the goods pledged to the bank".

Under clause (1), it is seen that the goods produce and merchandise mentioned in the schedule to the agreement which include all such stocks in the godown already deposited and the goods produce and merchandise which shall be hereafter deposited with the bank under the agreement were placed in the bank's possession and control under the terms of the agreement as above; such possession with the bank was admitted to be indisputable and apparent possession as well. The further, covenant was that the said stock in trade, merchandise, etc., shall stand pledged to the Bank as security for the payment of the balance under the cash-credit account on demand by the Bank at any time. Having thus agreed and as a consequence of such pledge, the Indian Bank secured indisputable possession of the stock and goods then existing and thereafter to be added in the godown as above. A further covenant was contemplated and the parties agreed to the same as is seen from clause 4 already extracted above. Besides the obligation on the part of the borrower company to maintain a register of the goods in the godowns as above and besides entering the day-to-day commercial transactions indulged by it with reference to such goods, the borrower shall furnish to the Bank daily a schedule or copy of all the entries in the said register as above notifying to the Bank the nature of the transactions and dealings it had with reference to the goods pledged with the Bank. The last sentence in clause 4 is rather important, and is therefore, repeated by us—

"The statement of stock held by the borrowers as *agents for the bank* returned from time to time is in the nature of rendering of account by agent to principal, and the statements so submitted shall be returns of the borrowers in their capacity as agents for holding the goods pledged to the bank".

This express stipulation between the parties makes it clear that the Bank reiterated their right to hold the goods in their own right and that they allowed the borrower, namely, the company in liquidation, to deal with such pledged goods which were in their juridical possession, under certain circumstances and subject to certain regulations. This is the nature of the transaction which is entered into by the Company with the first respondent on 30th November, 1959. As it is a pledge and as it related to a property of the company, the company had to register the said stock with the Registrar of Companies under section 125 of the Companies Act. The appellant herein which is the Canara Bank whose predecessor was the Pandyan Bank also claimed that subsequent to 30th November, 1959 a similar arrangement was sought for with the Bank and that it was granted excepting for the fact that the appellant bank is not able to say that there was an agreement similar to the agreement entered into between the Company in liquidation and the first respondent bank wherein the possession of the goods was given to the lending bank and that the lending bank in turn authorised the borrower to deal with the pledged goods or hypothecated goods in accordance with the understanding or arrangement between them. But, what is however agreed is that this hypothecation which is far subsequent to the pledge in favour of the Indian Bank on 30th November, 1959 was also registered as a charge by the very company with the Registrar of Companies. The Company was later wound up under orders of Court in C.P. No. 21 of 1961. It is unnecessary to deal with the circumstances under which the winding up was made. Suffice it, however, to say that the main reason for such winding was based on various acts of omissions and commissions on the part of the managing director of the company in liquidation.

2. In the above conspectus of events, the appellant bank claimed an equal right

with the Indian Bank, namely, the first respondent, on the foot that the dealings between the company in liquidation and the two Banks as above are similar in nature and that merely on the basis of the only fact that the hypothecation or the pledge in favour of the first respondent bank was in point of time anterior to that created in favour of the appellant bank, priority cannot be claimed by the respondent bank. The contention was that the floating charges created in favour of the rival banks crystallised only on the date of the order of winding up, and that therefore, there can be no question of any priority as between the rival banks. The other contention was that as the transactions sprang from an open violation of moral laws and as the managing director forged the signatures of the other directors so as to gain such accommodation from the two banks, a technical accent upon the matter as if the first respondent ought to be preferred as a secured creditor in preference to the appellant bank on the only ground that the charge in favour of the first respondent bank was prior in point of time is not equitable, and such equitable adjustment as between creditors similarly placed under similar circumstances was envisaged by this Court in the case reported in *Official Liquidator* v. *Commissioner of Police*[1], and as that principle was also accepted by the first Court in *The Punjab National Bank* v. *The Agent, Pandyan Bank, Ltd., Madras, etc.*[2], the counsel for the appellant says that the learned Judge ought not to have said that the first respondent will have priority and first charge over the goods pledged by the company with the appellant. We may incidentally conclude this part of the case by saying that after the winding up order, the Official Liquidator was directed to sell the available stock in the godowns in which they were stocked and the stock has been now converted into cash and as per directions of this Court, the Official Liquidator has invested the sum of Rs. 63,681 which was the available net sale proceeds.

1. (1969) I.L.R. 2 Mad. 559.
2. O.S.A. Nos. 9, 22 and 83 to 85 of 1969.

3. The short question before us is whether the first respondent bank is to be preferred on the basis of the arrangement referred to by us in the beginning or whether the two banks should share the sale proceeds *pari passu*.

4. It is unnecessary for us to deal at length with the principle which has to be invoked in the instant case as one of us laid down the principle that in such circumstances there should be a fair and equitable distribution of the assets of the company in liquidation as between the creditors similarly placed, and as that principle has been approved by a Division Bench in O.S.A. No. 9 of 1969, etc., batch, we rest content by stating the observations of the Bench:

> "The transactions entered into with the Pandyan Bank and the other Banks were all by the managing director, but the Judge has found that he has forged signatures of the other directors figuring as guarantors. It is no doubt true that the Pandyan Bank in point of time was the first lender in the case of these vehicles so far as these appeals are concerned. But it does not follow from it that in the liquidation proceedings that fact alone should weigh with the Court. Considering that the documents on the basis of which loans were raised were defective inasmuch as they were partly forged and that the banks were defrauded the learned Judge was right in departing from the normal rule that priority in mortgages must settle the priority of payment. We think that the learned Judge was justified in the circumstances in taking the view that equity demands that the banks should be equally treated and that they should each be paid *pari passu* in proportion to the amounts due to each of them or the vehicles in question on the date of the liquidation of the company".

5. The learned Judges of the Division Bench agreed with the principle that the normal rule of priority as applicable to mortgages and pledges should not be invoked in the instant case having regard

to the fact that institutions have been compelled to part with funds on false representations and this element ought to weigh while considering the equities as between the parties. No doubt that was a case where the managing director of the company in liquidation obtained advances from the banks and other creditors in respect of certain motor vehicles and it related to hire-purchase agreements and hypothecation agreements. This particular aspect alone weighed with the learned Judge when he said in the order appealed against—

"But, in the case now before me, I am concerned with pledges of goods, produce and merchandise, and as such the aforesaid observations cannot be applied, and an order passed directing payment to be made to the applicant bank and the first respondent bank *pari passu* in proportion to the amounts due to each of them".

With great respect, we are unable to agree with the learned Judge that motor vehicles are also goods in the eye of law as much as produce and merchandise are. The important thing to be noticed in the instant case is whether the methodology adopted by the managing director of the company in liquidation was similar in the case cited before us and in the case to be adjudicated upon by us. We do not find any reasonable difference between the two at all. In one case the subject-matter of the pledge was motor vehicles and the hire purchases related to them, and in the instant case the pledge of the hypothecation relates to goods, produce and merchandise. Even apart from this, the Bench, in the circumstances of this case, had to point out that equity demands that the Banks should be equally treated. The same goods were pledged by the same managing director under similar documents with banking institutions. This was noticed by the learned Judge and was not even disputed before us. Therefore, the company in liquidation channelised their attempts illegally, and by a process which normal and reasonable persons cannot comprehend. It was in those circumstances, in the earlier case, a special favour in favour of the Banks which have admittedly suffered a wrongful loss was shown and their rights were adjusted so that they could gain a division of the available assets equally.

6. In the light of our conclusion as above, it is unnecessary for us to go into the other question whether a valid pledge has been created in favour of the first respondent bank and whether the weight of the pledge or the hypothecation created in favour of the appellant bank is in any way lighter or different from the pledge in favour of the first respondent bank. We have already expressed the view that the judicial possession of the goods vested with the first respondent bank in view of the agreement dated 30th November, 1959. It is easy to presume in this case that as the pattern adopted by the managing director to obtain the advances from the banks is the same, he could have obtained such loans on the hypothecation of the same goods under similar terms even with the then Pandyan Bank and now the Canara Bank. We were at pains to find out from the summary of the facts rendered by the learned Judge whether there was any different method adopted by the managing director of the company in liquidation when he secured the loan from the Canara Bank, but we did not find any. We are therefore, constrained to presume in the instant case that all transactions made by the managing director, which resulted in the pledge of the stock with two independent banking institutions were under similar terms and subject to the same conditions. There is no serious dispute on this aspect before us.

7. Having regard to the fact that the managing director obtained such advances and credits by means which are not regular and which are no doubt fraudulent as well, we apply the principle adopted by the Division Bench in O.S.A. No. 9 of 1969 batch already referred to, and direct the Official Liquidator to divide the sale proceeds *pari passu* between the two banks, namely, the appellant bank and the first respondent bank, in proportion to the amount due to each of them. We make it however clear

that in view of the later decision of our Court in *Commissioner of Income-tax, Madras* v. *Manasuba and Co. (P.) Ltd., in liquidation, by Official Liquidator*[1], that the income from such investment made by the Official Liquidator belongs to the company, and is not available to the two creditors as above, this *pari passu* division would only refer to the principal amount of Rs. 63,681, but, the division shall be in proportion to the amount due on the date of liquidation of the company. The appeal is allowed to this extent. There will be no order as to costs.

S.J. —— *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Muthu Krishna Naidu and others .. *Appellants**

v.

T. M. Thamothara Chowdary and others .. *Respondents.*

Injunction—Suit for — Plaintiffs claiming protection under Tamil Nadu Cultivating Tenants' Protection Act (XXV of 1955) — Plaintiffs dispossessed after filing of suit—Petition, to amend prayer for recovery of possession, returned and not represented — Plaintiffs not entitled to injunction—Amendment not allowable at the stage of second appeal by the defendants-purchasers—Civil Procedure Code (V of 1908), Order 6, rule 17.

The plaintiffs who were the legal representatives of one *M* filed a suit for injunction against the defendants and claimed protection under the Tamil Nadu Cultivating Tenants Protection Act. The suit properties originally belonged to defendants 1 and 2 and were sold to defendant 3. Defendants 7 to 12 were the children of the third defendant and the 14th defendant was his wife. The 13th defendant was the wife of the 7th defendant. During the pendency of the suit, it was admitted that the plaintiffs were dispossessed. The plaintiffs who preferred an amendment of the prayer, for possession, did not re-present the petition which was returned. The trial Court dismissed the suit. However the lower appellate Court decreed the suit. On second appeal, by defendants 3 and 7 to 14,

Held: Merely because, a decree for injunction was granted, the plaintiffs would not be entitled to recover possession of the properties as the suit itself, was not decreed for possession. Injunction could be granted only if the plaintiffs were found to be in possession of the properties and when they were not in possession no injunction could be granted. It was the bounden duty of the lower appellate Court to have taken into account the subsequent events that had happened prior to the decree. It was not to say that in every case the subsequent events would have to be taken into account. But in a matter of this kind where the decree was to operate not only as on the date of suit but even subsequently thereafter, possession was a relevant factor and the Court could not ignore the fact that the plaintiffs had been dispossessed subsequent to the filing of the suit. No question of injunction, therefore, arose, and the suit was liable to be dismissed.

[*Para.* 3.]

The stage at which the plaintiffs could have asked for amendment was at the time when the suit was pending or at any rate when the plaintiffs preferred an appeal before the lower appellate Court. Even in the trial Court, they did file a petition asking for an alternative relief of possession, but, when that petition was returned for some compliance, the plaintiffs did not re-present the same. Therefore the petition for amendment could not be ordered.

[*Para.* 4.]

Second Appeal No. 1746 *of* 1973.—Appeal against the decree of the Court of the Subordinate Judge, Vellore in Appeal Suit No. 69 of 1972 preferred against the decree of the Court of the District

1. I.C. No. 229 of 1971.

*S.A. No. 1746 of 1973 and C.M.P. No. 11943 of 1976. *18th October*, 1976.

Munsif of Vellore in Original Suit No. 1121 of 1968.

Civil Miscellaneous Petition No. 11943 *of* 1976.—Petition praying that in the circumstances stated therein the High Court will be pleased to permit the petitioners to amend the plaint as follows:

Add para. 13 (*a*). Subsequent to the filing of the suit after 5th October, 1965 defendants 1 to 3 and 7 to 14 have interfered in the possession of the plaintiff and forcibly dispossessed them. The plaintiffs are therefore seeking the relief of recovery of possession alternatively "Para. (14) The cause of action for the suit arose on 30th June, 1968 when T. Mahadev Naidu, the original lessee in respect of the plaint schedule lands under defendants 1 and 2 died leaving behind the plaintiffs, and the defendants 4 to 6 as his heirs to succeeed to his rights and lease-hold interests and step in his shoes and on 9th August, 1968 and 23rd September, 1968 when the 3rd defendant assisted and abetted by defendants 1 and 2 and 7 to 14 committed acts of trespass and atrocities in the suit lands and caused damage to the crops standing thereon and subsequent to 5th October, 1968 when they interfered with possession of the plaintiffs and forcibly dispossessed them and subsequently within the jurisdiction of High Court" for the present para. 14 and place 16 (*a*) granting permanent injunction restraining defendants 1 to 3 and 7 to 14 from interfering with the peaceful possession and enjoyment of the plaint schedule properties by the plaintiffs and defendants 4 to 6 or in the alternative for recovery of possession of the plaint schedule properties from defendants 1 to 3 and 7 to 14 for the present para. 16 (*a*).

O. V. Baluswami, for Appellants.

K. Sarvabhauman and *R. Nandakumar,* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 3 and 7 to 14 are the appellants. The suit was filed by respondents 1 and 2 for a permanent injunction restraining defendants 1 to 3 and 7 to 14 from interfering with the plaintiffs' peaceful possession and enjoyment of the plaint schedule properties as long as they are the lessees and cultivating tenants in respect thereof. The suit properties originally belonged to defendants 1 and 2. They leased the properties in favour of one Mahadeva Naidu, the father and the husband of respondents 1 and 2 respectively. Subsequent to the death of Mahadeva Naidu on 30th June, 1968, the plaintiffs|respondents 1 and 2 claimed that as the legal representatives of the said Mahadeva Naidu, they are the lessees and that they are also cultivating tenants entitled to protection under the Tamil Nadu Cultivating Tenants' Protection Act. It appears that on 27th July, 1968 the properties were sold by the first and second defendants in favour of the third defendant. Defendants 7 to 12 are the children of the third defendont and the 14th defendant is the wife of the third defendant. The 13th defendant is the wife of the seventh defendant. On the ground that subsequent to the death of Mahadeva Naidu, defendants 1 to 3 and 7 to 14 are threatening to interfere with the possession and enjoyment of the plaintiffs, the suit was filed for a permanent injunction as stated already.

2. Both the Courts below have concurrently held that Mahadeva Naidu was a cultivating tenant entitled to the protection of the Cultivating Tenants' Protection Act. But, they did not go into the question whether the plaintiffs themselves are cultivating tenants. The trial Court proceeded to consider the question on the basis that as the legal heirs of Mahadeva Naidu, the plaintiffs are entitled to the protection, but dismissed the suit for injunction on the ground that though on the date when the suit was filed the plaintiffs have been proved to be in possession, they have admitted that they were dispossessed during the pendency of the suit. Since the plaint had not been amended in spite of the possession having gone to the defendants the trial Court dismissed the suit for injunction. The plaintiffs preferred an appeal. The lower appellate Court thought that since on the date when the suit was filed the plaintiffs were in possession, the subsequent events could not be taken into account in granting or refusing to grant

the injunction sought for and accordingly allowed the appeal and decreed the suit as prayed for.

3. In the second appeal, learned counsel for the appellants contended that since it is admitted by the respondents that subsequent to the filing of the suit, the defendants have got possession of the property, there is no case for granting an injunction and the lower appellate Court erred in thinking that it could not take into account the subsequent events which have a bearing on the question of injunction. The learned counsel, in my opinion, is well-founded in this contention. The suit is for an injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment of the plaint schedule properties as long as they are the lessees and cultivating tenants in respect thereof. In such circumstances, when the properties are not in the possession of the plaintiffs on the date when the decree was passed, I am unable to understand how this decree for injunction could be of any use or operation. Merely because a decree for injunction is granted, the plaintiffs will not be entitled to recover possession of the properties as the suit itself was not decreed for possession. If the plaintiffs had asked for an amendment of the plaint and prayed for possession and injunction on the finding that the plaintiffs are the tenants, they could have got possession and injunction. But I find that in the trial Court itself, though a petition for amendment was filed by them they did not pursue the same when it was returned to them and did not represent the same. Subsequent to the filing of the suit, the plaintiffs had been dispossessed and the properties are in the hands of the defendants and the injunction was refused. Though the plaintiffs filed an appeal, they did not choose to ask for possession. The lower appellate Court, as already stated, thought that even without possession an injunction could be granted and it is not necessary for him to take into account the subsequent events. Even if I were to sustain the decree of the lower appellate Court, what is the earthly use of that decree, I am unable to understand. It will not have the effect of decreeing the suit for possession. Injunction could be granted only if the plaintiffs are found to be in possession of the properties and when they are not in possession no injunction could be granted. It is the bounden duty of the lower appellate Court to have taken into account the subsequent events that had happened prior to the decree. It is not to say that in every case the subsequent events will have to be taken into account. But in a matter of this kind where the decree is to operate not only as on the date of suit but even subsequently thereafter, possession is a relevant factor and the Court cannot ignore the fact that the plaintiffs have been dispossessed subsequent to the filing of the suit. No question of injunction, therefore, arises and the suit is liable to be dismissed.

4. The second appeal came on for hearing on 4th October, 1976. After hearing the arguments of the learned counsel, when I am was about to deliver judgment it was considered necessary that a further opportunity should be given to the plaintiffs to withdraw the suit itself if necessary and consider the filing of an application under the Cultivating Tenants Protection Act for possession of the properties. Today, the learned counsel for the plaintiffs|respondents came forward with a petition C.M.P. No. 11943 of 1976 for amendment of the plaint. The petition for amendment sought to add a paragraph in the plaint to the effect that subsequent to the filing of the suit on 5th October, 1968, defendants 1 to 3 and 7 to 14 have interfered with the possession of the plaintiffs and forcibly dispossessed them and that therefore, the plaintiffs are seeking the relief of recovery of possession alternatively. Amendment of cause of action paragraph also was asked for and with an additional prayer for possession of the suit properties. As already stated, the stage at which the plaintiffs could have asked for this amendment is at the time when the suit was pending or at any rate when the plaintiffs preferred an appeal before the lower appellate Court. In this Court, as already stated, the appellants are defendants 3

and 7 to 14. In this second appeal when the plaintiffs who have not got a decree for possession as it is and have not filed any appeal, how they could amend the plaint now as respondents and ask for an additional decree for possession, I am unable to understand. If this petition were to be allowed even without an appeal by the plaintiffs as against the decree of the trial Court dismissing the suit, the plaintiffs would have to be given a decree for possession when they had not even filed an appeal. Further, this is a belated petition. It is not as if they were not aware of the need for asking for amendment with a prayer for possession. Even in the trial Court, they did file a petition asking for an alternative relief of possession, but when that petition was returned for some compliance, the plaintiffs did not re-present the same. Even when they filed an appeal, they did not ask for possession either by amending the plaint or otherwise. They wanted to take the risk deliberately without any amendment of the plaint and to be satisfied with a mere decree for injunction even though they had been dispossessed. I am, therefore, unable to order this petition for amendment at this stage. The petition C.M.P. No. 11943 of 1976 is accordingly dismissed.

5. As already stated, since the injunction could not be operative and could not be granted in favour of the plaintiffs as they are not in possession of the suit properties as on date, the second appeal is allowed and the judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court are restored. There will be no order as to costs. No leave.

6. It is not necessary for me to say that whatever remedies that are open to the plaintiffs now for recovery of possession of the properties are not affected by this judgment.

S.J. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*N. S. Ramaswami, J.*

Santhakula Sowmiyanarayana Kavaraya Community Endowments, through its present trustees M. K. Perumal and another .. *Appellants**

v.

Vellayappa Pillai and 17 others .. *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), section 109—Applicability.

Section 109 of the Tamil Nadu Hindu Religious and Charitable Endowments Act (XVII of 1959), says that nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor-in-title before the 30th September, 1951. In the present case, after 1923 the suit property had become a religious institution because it became the property of a specific kattalai of the plaintiff-community. Therefore, unless the defendants can show that they had perfected title by adverse possession prior to 30th September, 1951, there was no question of the plaintiff's title to the property being lost by the law of limitation. [*Para.* 7.]

Appeal against the decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 179 of 1968 preferred against the decree of the Court of the District Munsif of Palani in Original Suit No. 78 of 1965.

A. Venkatesan and *K. Srinivasan,* for Appellants.

P. Ramaswami, for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this second appeal arises is for declaration of

* S.A. No. 1303 of 1972. 25*th October*, 1977.

title and for possession of a building described as 'kavadi madam'. The suit is filed by the Santhakula Sowmiyanarayana Kavaraya Community Endowments through its trustees. The title is claimed under Exhibits A-1 to A-3. The building was said to belong originally, to Ramalinga Pillai and that he mortgaged the property to a third party. There was a suit on the mortgage and, in execution of the decree, it came to be sold in 'Court' auction. Exhibit A-1 dated 24th July, 1923, in the sale certificate issued to the auction purchaser, *viz.*, Palaniappa Pillai, of the property. Delivery of possession was taken as evidenced by Exhibit A-2, the certified copy of the delivery *athakshi*. The auction-purchaser sold the property to one Subba Naicker under Exhibit A-3 dated 22nd November, 1923. It is the case of the plaintiff that Subba Naicker purchased the property not for his individual purpose but only for the community as the property of a special kattalai, as he happened to be the mahimaidar of the community. It is the further case of the plaintiff that from the date of the purchase under Exhibit A-3, the madam was being run in the building as part of a kattalai in Palaniandavar temple, and that one Arayee Ammal who is the purchaser from the original owner, Ramalinga Pillai, was put in management of the madam.

2. The plaintiff claimed declaration of title and possession from the first defendant and the other defendants, who are said to be lessees under the first defendant, on the ground that Arayee Ammal who was the manager of the plaintiff-community, had purported to sell the property to the first defendant under Exhibit B-4 dated 27th December, 1951.

3. The defendants contended that the property did not originally belong to Ramalinga Pillai that it belonged to one Mahapuri Pandaram, that after him, his daughter, Lakshmi, succeeded to the property and Arayee, the vendor of the first defendant, is the daughter of the above said Lakshmi. According to the defendants, Arayee succeeded to her mother's interest and she was in possession of the property in her own right and not as manager on behalf of the community as claimed by the plaintiff.

4. The trial Court accepted the case of the plaintiff and decreed the suit. The lower appellate has non-suited the plaintiff practically on the ground of, the first defendant perfecting title by adverse possession.

5. The lower appellate Court has accepted the case of the plaintiff that Arayee, the vendor of the first defendant was in possession of the suit property only as a manager under the plaintiff. At the end of paragraph 11 of its judgment, the lower appellate Court has categorically held that Arayee was in possession of the property only on behalf of the community. It further held that, till 1951, when she purported to sell the property to the first defendant, there was no question of adverse possession.

6. It was of the view that, from the date of Exhibit B-4 the sale deed executed by Arayee in favour of the first defendant, possession of the first defendant was adverse to the plaintiff and that the plaintiff thereby lost title. This view is, obviously incorrect.

7. The lower appellate Court has not negatived the plaintiff's case that the building which was purchased under Exhibit A-3 by Subba Naicker became the Kavadi Madam belonging to the specific kattalai conducted by the community and, as I said, it has, in fact, accepted the plaintiff's case that Arayee, the vendor of the first defendant, was in possession of the property only as the manager under the plaintiff-community. On this finding, the further finding of the appellate Court that the plaintiff has lost title by adverse possession is clearly wrong. It had overlooked section 109 of the Tamil Nadu Religious and Charitable Endowments Act (XXII of 1959). That section says that nothing contained in any law of limitation for the time being in force shall be deemed to vest in any person the property or funds of any religious institution which had not vested in such person or his predecessor-in-title before the 20th September, 1951. There can be no dispute that after 1923,

the suit property has become a religious institution because it became the property of a specific *kattalai* of the plaintiff-community. Therefore, unless the defendants can show that they have perfected title by adverse possession prior to 30th September, 1951, there is no question of the plaintiff's title to the property being lost by the law of limitation.

8. In passing, the lower appellate Court has remarked that the plaintiff has not clearly shown that the property, originally belonged to Ramalinga Pillai. But, it should be remembered that Ramalinga Pillai had mortgaged the property very much prior to 1923 and it was in execution of the mortgage decree, the property came to be sold to Palaniappa Pillai. As far as the case of the defendants is concerned, there is no documentary evidence to show that Arayee had any independent title. Exhibit B-4, dated 27th December, 1951, the sale deed executed by Arayee, is the earliest document relied on by the defendants. It is true that in the Town Survey Register, the name of one Mohapuri Pandaram is shown as the owner of the suit property. It is stated that the Town Survey was done prior to 1923. The case of the plaintiff has been that this Mohapuri Pandaram had *alias* name *viz.*, Arumuga Pandaram, and he is no other than, the father of Ramalinga Pillai. The appellate Court feels that the plaintiff has not established clearly that Arumuga Pandaram and Mohapuri Pandaram are one and the same person. But, the fact remains that Arayee Ammal had herself been impleaded as a party in the execution proceedings in the mortgage suit which ultimately resulted in the sale of the property in favour of Palaniappa Pillai. An attempt had been made by the defendants that Arayee Ammal who had been impleaded as a party in the said proceedings is a different person than Arayee Ammal, the vendor under Exhibit B-4. But, the Courts below have not accepted such a case of the defendants. The first appellate Court has given a clear finding that Arayee Ammal and her husband Maruthamuthu Pillai, had been in permissive possession under the plaintiff. The vendor under Exhibit B-4 is the said Arayee Ammal, the wife of Maruthamuthu Pillai. Under such circumstances, the plaintiff's case that this Arayee Ammal is the sister of Ramalinga Pillai the judgment-debtor in the mortgage suit, and it is because of such relationship she came to be impleaded in those proceedings appears to be probable. Whatever that be, on the finding of the lower appellate Court that the plaintiff had been in possession of the suit property through Arayee Ammal and her husband, Maruthamuthu Pillai, till 1949 or so, it is not possible to accept the case of the defendants that the first defendant got title under the sale deed, Exhibit B-4 executed by the said Arayee Ammal.

9. As I said, the lower appellate Court has non-suited the plaintiff mainly on the ground of adverse possession. It is of the view that from 27th December, 1951, the date on which the first defendant purported to purchase the property from Arayee Ammal, possession was not permissive and adverse and therefore the plaintiff's title had been lost. I have already indicated that by virtue of section 109 of Act XXII of 1959, the plaintiff's title cannot be lost by adverse possession. The result is the Second Appeal is allowed and the judgment and decree of the lower appellate Court are set aside and those of the trial Court restored. However, under the circumstances of the case, I direct the parties to bear their respective costs throughout.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—A. Varadarajan, J.

M/s. Nilgiri Dairy Farm 13, Poonamallee High Road Periamet, Madras-3 and others .. *Petitioners**

v.

Manoharan .. *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of 1973), section 10 (3) (a) and (c)—Petition for eviction by landlord—Requirement of landlord for additional accommodation for carrying on business alleged—Petitioner not carrying on any business in any portion of the building—"Carrying on business"—Meaning—Interpretation of Statutes.

It cannot be said that the words "carrying on business" occurring in section 10 (3) (c)-(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act should be construed in the same manner as similar words in section 10 (3) (a) in the Act, for two reasons. The first is that section 10 (3) (c) deals with additional accommodation which implies that accommodation which is already in the occupation of the landlord for the purpose of the business which he is carrying on is not sufficient, necessitating additional accommodation by evicting tenants from other portions of the same building which are in their occupation ; the second is that the question of relative hardship or advantage does not arise for consideration in cases governed by section 10 (3) (a) of the Act, while it does arise for consideration in cases governed by section 10 (3) (c) of the Act. The proviso to that section provides that in the case of an application under clause (c), the Rent Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord.

Held, that as the respondent in the revision petition was not occupying any portion of the building for the purpose of any business at present, he was not entitled to seek eviction of the petitioners on the ground of additional accommodation.

[*Para.* 8.]

*C.R.P. Nos. 1549 etc. of 1976.

19*th April*, 1977.

Cases referred to :

R.M. Solai Nadar v. *M/s. A.T.A.V. Guruswami Nadar and Company*, (1969) All India R.C.J. 767 ; *P.N. Raju Chettiar* v. *The State of Tamil Nadu*, (1970) All India R.C.J. 440 ; *Nataraja Achari* v. *Balasubramaniam*, (1967) 2 M.L.J. 492 ; *Ramaswami Pillai* v. *Karmega Thevar*, I.L.R. (1964) 1 Mad. 712: (1964) 2 M.L.J. 89.

Petition under section 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Court of the Small Causes, Madras (IV Judge), dated 19th March, 1976 and made in H.R.A. Nos. 554, 550, 551, 552 and 553 in 1974 (H.R. C. Nos. 901, 897, 898, 899 and 900 of 1973 on the file of the Court of Small Causes (VI Judge, Madras.)

C. Natarajan and *C.N. Sivakumar*, for Petitioners.

The Court delivered the following

JUDGMENT.—The petitioners are the tenants, who had succeeded before the Rent Controller, but lost before the appellate authority. They occupy six rooms in the ground floor of the building called 'Jaya Mansions' in Periamet, Madras. The respondent's case is that in a partition effected in December, 1972 between himself and his two brothers he obtained 38 rooms in the first and second floors and 11 rooms in the ground floor for his share. He filed petitions for eviction of the petitioners herein and another occupying the said six shops in the ground floor on the ground that he required additional accommodation for locating his kitchen, dining halls, office, servants' quarters and store-room and also for providing an entrance to the vacant space situate behind the building to be used as a car park in connection with his hotel, restaurant, boarding and lodging business.

2. The petitioners herein opposed the petitions contending that the respondent is not already carrying on any hotel, restaurant, boarding and lodging business in the premises and, therefore, he is not entitled to seek their eviction on the ground of additional accommodation under section 10 (3) (c) of the Madras Buildings (Lease and Rent Control) Act, 1960. The petitioners further contended that cars were being parked only on the road previously and that the petitions for eviction are not *bona fide* as the respondent had no means to start any hotel business having regard to the fact that he had not paid the electricity charges of Rs. 4,000 resulting in the supply of electricity being disconnected and also he was not in a position to pay income-tax arrears to the extent of Rs. 50,000 as a result of which the tenants have been compelled to pay the rents to the Income-tax department on pain of distress warrants being issued against them in case of non-payment. The petitioners also contended that the hardship that may be caused to them by the order of eviction will outweigh the advantage that may accrue to the respondent.

3. The learned Rent Controller upheld the pleas of the petitioners that the respondent is not carrying on any business at present and, therefore, he is not entitled to seek eviction of the petitioners under section 10 (3) (c) of the Act on the ground of requirement of additional accommodation and also that his requirement was not *bona fide*. He dismissed the petitions without going into the question of the relative hardship that may be caused and the advantage that may accrue to the parties.

4. On appeal, the respondent produced Exhibit P-10, a police licence issued to him after the date of the petition for running a lodging house in the premises and it was admitted as additional evidence by the appellate authority as per order in M.P. No. 160 of 1976. The appellate authority allowed the appeals on the ground that the respondent had made necessary preparations for starting a boarding house and that his request for additional accommodation is *bona fide*. The appellate authority found that the liability to pay the income-tax arrears of Rs. 50,000 which has not been paid, would show that the respondent is a well-to-do person having means to carry on the business. He disagreed with the Rent Controller and found that the petitions under section 10 (3) (c) of the Act are maintainable on the ground that the respondent had made necessary preparations by way of white-washing and colour washing of the premises, providing mosaic flooring for the premises and obtaining police licence, Exhibit P-10 and that he was in occupation of 38 rooms in the first and second floors and 11 rooms in the ground floor. He has construed possession as occupation. As regards the hardship the appellate authority found that the advantage to the respondent would be greater than the hardship to the petitioners. It has also found that there was an additional safeguard under section 10 (5) of the Act which provides that where a landlord who has obtained possession of a building in pursuance of an order under sub-section (3) does not himself occupy it for the purpose specified in the order within one month of the date of obtaining possession or having so occupied it, vacates it without reasonable cause within 6 months of such date, the tenant who has been evicted may apply to the Controller for an order directing that he shall be restored to possession of the building and the Controller shall make an order accordingly notwithstanding anything contained in section 3 of the Act. On these findings the appellate authority allowed the appeal and ordered eviction of the petitioners.

5. What is established by the evidence is that in a partition which is said to have been effected in December, 1972 between the respondent and his brothers, the respondent got for his share 38 rooms in the first and second floors of the entire building and 11 rooms in the ground floor and those 11 rooms are in the occupation of 12 tenants including the five petitioners in the civil revision petitions. There is a vacant space measuring 6000 sq.ft. on the rear side

of the building and it could not be reached now from the front side for want of necessary access. The respondent had white-washed and colour-washed the premises and provided some mosaic floor. He has alleged in the petitions that he was taking steps to obtain the police licence for running the lodging house in the premises; but in fact he had obtained the police licence, Exhibit P-10 during the pendency of the appeals before the appellate authority and produced the same as additional evidence in M.P. No. 160 of 1976. The respondent has admitted in his evidence that he is not carrying on any hotel, restaurant, boarding and lodging house business at present. The evidence does not establish that the respondent is seeking eviction of the petitioners for any oblique purpose. Though the petitioners had contended in their counter statements that there was a demand for enhancement of rent, no evidence worth the name has been adduced by the petitioners to show that there was a demand for enhancement of rent and the eviction petitions had been filed on account of non-compliance with this demand. In the light of the abovesaid facts which are established by the evidence, it is necessary to consider whether the respondent requires the premises *bona fide* as additional accommodation and whether the petitions under section 10 (3) (*c*) of the Act are maintainable.

6. There is evidence to show that the respondent's family had been carrying on a hotel business in some portions of the entire building previously and that business had been stopped on account of misunderstanding in the family as a consequence of which the three brothers got their properties divided in December, 1972. The respondent does not appear to have the necessary means to start any new business of running hotel, restaurant, boarding and lodging house at present, though he seems to own 38 rooms in the first and second floors and 11 rooms in the ground floor of the building which had fallen to his share in the partition effected ni December, 1972. The evidence would show that property tax to the extent of Rs. 4,000 has not been paid by the respondent, that the electricity connection for the premises had been disconnected on account of the failure on the part of the respondent to pay electricity charges to the extent of Rs. 5,000 and that the respondent was not able to pay income-tax arrears due to the extent of Rs. 50,000 as a result of which the tenants including the petitioners had been directed by the Income-tax Department to pay the rents to the Income-tax Department on pain of distress warrants being issued against them in the event of their failure to comply with that demand. It is under these circumstances that the learned Rent Controller has found that the respondent does not have the necessary means to start a hotel, restaurant, boarding and lodging business. It is not possible to agree with the learned appellate authority that the respondent has the necessary means to start the business. It is not possible to agree with him that the fact that income-tax arrears to the extent of Rs. 50,000 are due from the respondent would show that the respondent owns properties and that he has means. The learned appeallate authority has overlooked the fact that the amount remained unpaid as a result of which the Income-tax Department had directed the tenants to pay the rents to the Department directly on pain of distress warrants being issued against them in case of non-payment. The respondent is not able to pay electricity charges to the extent of Rs. 5,000 and property tax to the Corporation of Madras to the extent of Rs. 4,000. The electricity connection had to be disconnected on account of his failure to pay the electricity charges of Rs. 5,000. Under these circumstances, I agree with the Rent Controller that the respondent does not have the necessary means at present to start a hotel, restaurant, boarding and lodging business.

7. It was strenuously contended on behalf of the petitioners that since the respondent is not admittedly carrying on the hotel, restaurant, boarding and lodging business in the premises and is not occupying any portion of the premises for the purpose of any such business,

though he may be in possession of 38 rooms in the first and second floors of the premises, the petitions for eviction under section 10 (3) (c) of the Act on the ground of *bona fide* requirement of additional accommodation are not maintainable. It was submitted by the learned counsel for the petitioners that the view that "carrying on business" in section 10 (3) (a) (iii) of the Act would be satisfied when the landlord has made the necessary preparations for carrying on the business and that it is not necessary that he should be actually carrying on the business is only in cases where eviction is sought on the ground of owner's occupation and that such a view has not been taken in the case of the requirement of additional accommodation under section 10 (3) (c) of the Act which, according to the learned counsel for the petitioners, would not apply to the case where the landlord is not in actual occupation of a portion of the same building for the purpose of a business which he is actually carrying on, on the date of the petition for eviction of the tenant on the ground of requirement of additional accommodation. The learned counsel for the respondent invited my attention to the decision in *R. M. Solai Nadar* v. *M/s. A. T. A. V. Guruswami Nadar & Co.*[1], and *P. V. Raju Chettiar* v. *The State of Tamil Nadu and others*[2], and also to certain passages at pages 278 and 282 of the twelfth edition of Maxwell on Interpretation of Statutes and contended that the meaning similar to the one given to the words "carrying on business" in section 10 (3) (a) (iii) of the Act must be given to similar words occurring in section 10 (3) (c) of the Act and that the petitions for eviction of the tenants on the ground of requirement of additional accommodation should be held to be maintainable if the landlord has made necessary preparations for starting a hotel business. Ramaprasada Rao, J., as he then was, has observed in *R. M. Solai Nadar* v. *M/s. A. T. A. V. Guruswami Nadar & Co.*[1] thus:

> "Thus the case-law is abundant and at once varying. The general principle noticeable in the majority of cases appears to be that *bona fide* preparation to do business at the place where the tenant is trading coupled with an honest and a genuine need for the same would entitle a landlord for an order under the section."

A Bench of this Court had observed in *P. V. Raju Chettiar* v. *The State of Tamil Nadu and others*[1] thus:

> "Ramaswami, J., in Civil Revision Petition No. 1891 of 1956 held that a preparation to do business would suffice to enable the landlord to invoke the provision, Panchapakesa Ayyar, J., in *Nataraja Achari* v. *Balasubramaniam*[2] and Ramachandra Iyer, C.J., in *Ramaswami Pillai* v. *Karmega Thevar*[3], more or less subscribed to that view."

8. "On a careful consideration of the language employed by the section and particularly the words we have extracted and also the view of the several single Judges, we are of the view that while the literal construction placed by Basheer Ahmed Sayeed, J., does not, with due respect, commend itself to us, the other view appears to be reasonable. We think so because "carrying on a business" may consist of a series of steps, and, even if one step is proved, we do not see why the requirement is not satisfied.

We find the following passages in pages 278 and 282 of the twelfth edition of Maxwell on Interpretation of Statutes:

> "It has been justly remarked that when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. Accordingly, in ascertaining the meaning

1. 1969 All India R.C.J. 767.
2. (1970) All India R.C.J. 440.

1. 1970 All. India R.C.J. 440 at 442.
2. (1967) 2 M.L.J. 492.
3. I.L.R. (1964) 1 Mad. 712 : (1964) 2 M.L.J. 89.

to be attached to a particular word in a section of an Act, though the proper course would seem to be to ascertain that meaning from a consideration of the section itself if possible, yet, if the meaning cannot be so ascertained, other sections may be looked at to fix the sense in which the word is there used. Furthermore, 'where a word has been construed judicially in a certain legal area, it is, I think, right to give it the same meaning if it occurs in a statute dealing with the same general subject-matter unless the context makes it clear that the word must have a different construction'.

From the general presumption that the same expression is presumed to be used in the same sense throughout an Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning. 'Where the Legislature' said Lord Tenterden, C.J., 'in the same sentence uses different words, we must presume that they were used in order to express different ideas'."

It is not possible to agree with the learned counsel for the respondent that the words "carrying on business" occurring in section 10 (3) (c) (iii) of the Act should be construed in the same manner as similar words in section 10 (3) (a) in the Act had been construed by the Courts as in the aforesaid two decisions. It is enough to give two reasons in support of the view. The first is that section 10 (3) (c) deals with additional accommodation which implies that the accommodation which is already in the occupation of the landlord for the purpose of the business which he is carrying on is not sufficient, necessitating additional accommodation by evicting the tenants from other portions of the same building which are in their occupation. The second is that the question of relative hardship or advantage does not arise for consideration in cases governed by section 10 (3) (a) of the Act, while it does arise for consideration in cases governed by section 10 (3) (c) of the Act. The proviso to that section provides that in the case of an application under clause (c), the Controller shall reject the application if he is satisfied that the hardship which may be caused to the tenant by granting it will outweigh the advantage to the landlord. Therefore, I agree with the learned counsel for the petitioners that as the respondent is not occupying any portion of the building for the purpose of any business at present, he is not entitled to seek eviction of the petitioners in this case on the ground of additional accommodation.

9. Since the respondent is not occupying any portion of the building for the purpose of any business which he is actually carrying on at present, it is not possible to consider the question of the relative hardship. There is evidence on the side of the petitioners to the effect that it will be difficult to obtain accommodation in the same locality and for alternative accommodation larger amount has to be paid by way of rent, that the petitioners will not get the present customers if they shift their business places and that they will not be able to collect the outstandings if they vacated the premises in question. No doubt, hardship will always be there in all cases where the tenants occupying portions of the building are evicted on the ground of additional accommodation by the landlord. But in the present case, since the respondent is not occupying any portion of the buildings for any business, which he is actually carrying on, on the date of the petition, it could not be stated that he would have any advantage by the additional rooms which may become available to him on the eviction of the petitioners. There is no material and in the nature of things there cannot be any to show that the portions which are available are not sufficient for the purpose of any business which the respondent is carrying on the date of the petition, since, as already stated, no business is actually carried on the date of the petition. Therefore, it is not possible to hold that the respondent will have advantage which will outweigh the hardship which

may be caused to the petitioners by the order of eviction.

10. In these circumstances, the Civil Revision Petitions are allowed with costs throughout and the orders of the Rent Controller are restored. Advocate's fee one set.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

K. P. Periyannan (fit person) Sri Venugopalakrishnaswamy Temple (cause title amended as per order of Court, dated 17-1-1977 in C. M. P. No. 459 of 1977) .. *Appellant**

v.

Deity Venugopalakrishnaswamy represented by Poojari Nallappan and another .. *Respondents.*

Land Acquisition Act (1 of 1894), sections 30 and 31—Land belonging to temple—Acquisition by Government—Race between hereditary archakas and trustees appointed by Hindu Religious Endowment Administration Department to interest on compensation amount—Trustees not performing "Samprokshanam" *—Claim of trustees not tenable—Prior proceedings recognising right of archakas—Effect—Operates as* res judicata.

Three and odd acres of dry land belonging to Venugopalakrishnaswamy temple in Bonganapalli Village in Krishnagiri Taluk of Dharmapuri District, were acquired by the Government. There was a dispute regarding the right to claim interest on the compensation amount awarded between the hereditary archakas of the temple on the one side and the trustees appointed by the Hindu Religious Endowments Department on the other. In prior proceedings in the presence of the trustees appointed by the H. R. & C. E. Board the hereditary archakas had been held entitled to be in possession of the acquired land and after acquisition to receive the interest on the compensation amount. The District Judge, who heard the suit decided in favour of the hereditary archakas. On appeal,

Held: The judgment in the earlier proceedings would operate as *res judicata* and the claim of the archakas had become indisputable. [*Para.* 5.]

In passing, the Court referred to the "recalcitrant and unsatisfactory conduct of the trustees appointed by the Board who had not performed for quite a long time the "*Samprokshanam*" or purificatory ceremony of the temple and neither they nor the Department could retort that the archakas did not perform their service of archana. The Commissioner of the Hindu Religious Endowment Department was directed to take note of the most unsatisfactory state of affairs prevailing in the temple by not doing "*Samprokshanam*" for several decades. [*Paras*. 6 *and* 9.]

Appeal against the decree dated 7th April, 1967 of the District Court Dharmapuri at Krishnagiri and passed in O.P. No. 25 of 1965.

R. Shanmugham, for Appellant.

A. Ramanathan and *R. Vedantham,* for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—An extent of 3-48 acres of dry land in S. No. 795 in Boganapalli Village was acquired admittedly for a public purpose. A compensation of Rs. 27,653-47 was awarded. The title to the property admittedly stands in the name of Venugopalakrishnaswami Devaru of Boganapalli Village, Krishnagiri Taluk. There is no dispute about the title at all. But in the present proceedings, the race is between claimants 1 and 4, who claim that they are entitled to be paid the interest which accrues from and out of the above corpus for them to conduct the ritual and affairs of Venugopalakrishnaswami Devaru, and claimants 2 and 3, who claim as the hereditary archakas entitled to possession of the lands compulsorily acquired. According to the claimants 2 and 3, they are

*Appeal No. 211 of 1972. 18*th January,* 1977.

entitled to the interest to enable them to render archana service to the deity.

2. Claimant No. 1, is the deputy of claimant No. 4, who in turn is the Managing Trustee of this temple, having been so appointed by the Hindu Religious and Charitable Endowment Board. Claimant No. 1, the deputy, sails along with claimant No. 4, and in the capacity as such trustee and deputy, they claim that they are entitled to interest which accrues from the compensation awarded. Both parties agree that the said compensation should remain in Court deposit, and it is only the income that accrues therefrom which has to be operated upon. Whilst the case of claimants 1 and 4 is that they are entitled to receive the accruing interests, the contention of claimants 2 and 3 is that they would be entitled to it as hereditary archakas. This is the sum and substance of the pleading.

3. The learned Judge, who went into such conflicting claims, considered the earlier proceedings which took place as between the predecessors of claimants 2 and 3 and the prior appointees of the Hindu Religious and Charitable Endowments Board, in which there was a declaration that the hereditary archakas are entitled to be in possession of the acquired land, and that without any powers of alienation therefor, they should enjoy the same in lieu of the archaka service, which was expected from them and which they were mandated to do as hereditary archakas to the deity Venugopalakrishnaswami Devaru. The learned Judge, after noticing the earlier judgments, which, according to him, were binding on the present contesting claimants, upheld the claims of claimants 2 and 3 in preference to that of claimants 1 and 4. The fourth claimant appeals.

4. The contention of the learned counsel for the appellant is that as claimant No. 4 is the Managing Trustee and claimant No. 1 is his deputy appointed for the purpose of rendering such duties as are obligated on the Managing Trustee, they should be declared to be the persons entitled to the interest accruing from the compensation amount so as to enable them to render service to the deity. According to him, the earlier proceedings do not have a clear bearing on the question in issue. But claimants 2 and 3 mainly rely upon the proceedings which transpired between their predecessors-in-interest and the trustees of the temple in which their right as hereditary archakas was unequivocally declared, and incidentally their right to possess and enjoy the suit properties was also made clear. It is, therefore, necessary for us to consider the earlier proceedings so as to find a solution for the conflict between the two sets of claimants.

5. Ammani Ammal was the mother of one Girivasa Iyengar. She filed O.S No. 384 of 1931, District Munsif's Court Krishnagiri, the judgments in which are exhibited as Exhibits A-6 and A-4. In that suit, she claimed to be the hereditary archaka and also dharmakartha. The trial Court recognised the same. But the appellate Court whose judgment is exhibited as Exhibit A-5, confirmed only her right in so far as it related to the hereditary archakaship but would not recognise her right as dharmakartha or trustee. After her death, Girivasa Iyengar filed O.S. No. 447 of 1940 on the file of the District Munsif's Court, Krishnagiri against the trustees, who were by then in possession of the properties which ought to be in the possession of the archakas of the temple. Girivasa Iyengar, claiming such a status in himself by virtue of the decision in O.S. No. 384 of 1931, filed the action for possession of such properties. The suit was decreed *ex parte*. There was no further appeal as against it. Pursuant to the said decree, which was rendered in the presence of the trustees appointed by the Hindu Religious and Charitable Endowments Board, Girivasa Iyengar, took possession of the properties to enjoy the income therefrom and for purposes of rendering the archaka services in lieu thereof. This state of affairs continued for some time until the compulsory acquisition proceedings started in 1945. For an admitted public purpose, certain lands which were in possession of the hereditary archakas of the temple were

acquired in or about the year 1945. This led to conflicting claims again between the hereditary archakas on the one side and the trustees appointed by the Hindu Religious and Charitable Endowments Board on the other. This was fully enquired into, and it was admitted before us that under Exhibit A-11, which was a judgment rendered by the Subordinate Judge of Salem in L.A.C. No. 10 of 1945 the entitlement of the hereditary archakas to receive the interest on the compensation amount awarded in the compensation proceedings was finally recognised. From this, it follows that even as early as 1945, the right to enjoy the properties which were the subject-matter in this appeal as well as the subject-matter of L.A.C. No. 10 of 1945 was upheld in favour of the hereditary archakas. This would mean that in the presence of the trustees appointed by the Hindu Religious and Charitable Endowments Board, the right of the archakas to enjoy the properties in question or a part thereof and in consequence to receive the interest from the compensation amount after acquisition was recognised and has become indisputable. Exhibit A-11, therefore, effectively would operate as *res judicata*, as against the trustees appointed by the Board, and they are not in a position as at present to raise the plea once over that the compensation amount in question has to be invested no doubt in the name of the deity. but the income therefrom should be paid over to them for purposes of some imaginery services to be performed by them to the deity.

6. In passing, we would like to refer to the recalcitrant and unsatisfactory conduct of the trustees appointed by the Board. The learned Subordinate Judge in his judgment Exhibit A-5 has observed as follows:—

> "It is therefore unnecessary to give plaintiff a decree for money for purpose of doing the purificatory ceremonies. There will however, be a direction to the second defendant that he will perform the *Samprokshana* or purificatory ceremonies within three months from this date."

This judgment was on 17th January, 1936. The learned Judge in these proceedings has noted:

> "Probably no *Samprokshana* ceremony has been done up to now."

There is no representation before us that the second defendant in the earlier suit, who is now the first claimant before us, has ever done the *Samprokshana* or purificatory ceremonies to the deity at all. This is the attitude of the trustees appointed by the Hindu Religious and Charitable Endowments Board. But, yet, such a trustee would demand that the interest from the compensation amounts, which ought to, in the circumstances of the case, be paid over to the hereditary archakas as per the earlier judgments, should be paid over to him on the ground that he has performed some unknown services to the Devaru.

The archanas can be performed only after *Samprokshanam*. When the trustees have not performed so far the *Samprokshanam*, or the purificatory ceremony the claimant No. 4 cannot with any grace claim that the archaka did not perform his services of archana. Apart from this he cannot, in these proceedings, resist the declared entitlement of the hereditary archaka to claim the interest accruing from the compensation amount.

7. We have already referred to the short facts. Another piece of land standing in the name of the deity but set apart for archaka services to which possession and income therefrom the hereditary archakas were entitled was acquired for an admitted public purpose. The compensation amount has been deposited in Court. There comes the claim once again by the trustee whom we have characterised as a person who cannot with any grace and sincerity under which they oppose the grant of interest to the hereditary archaka. Not only because he has sinfully failed to perform his elementary duty of purificatory ceremony to the deity for decades, but also because he cannot challenge the decrees and

judgments in the earlier proceedings such as Exhibits A-11, A-5 etc., in which the right of the hereditary archakas to be in possession of the lands acquired and in consequence to enjoy the income therefrom have been recognised fully the claim is unjustified. Both on the principle of *res judicata* and also on the ground that the hereditary trustee by no stretch of imagination could be entitled to the payment of the interest accruing from the compensation amount, the trial Court rightly upheld the claims of the hereditary archakas *viz.*, claimants 2 and 3, who are the successors-in-interest of Girivasa Iyengar. There is no substance in the claim made by the first claimant as the deputy of the fourth claimant, who is the trustee so appointed by the Hindu Religious and Charitable Endowments Board.

8. The appeal, therefore, fails and it is dismissed. There will be no order as to costs.

9. The Commissioner, Hindu Charitable and Endowments Department, shall take note of the most unsatisfactory state of affairs which are prevailing in this temple. If what has been brought to our notice is right, then the purificatory ceremony for the deity has not been done by the trustees appointed by the Board. Such *samprokshanan* appears not to have been done for several decades. This observation of ours is based upon the judgment of the trial Court. There is no better evidence before us to conclude otherwise. If the trustees appointed by the Board did not care to do the *Samprokshanam* for the deity for years, one cannot expect the archakas to perform the archanas to the deity. This unsatisfactory state of affairs has to be set right immediately. The Commissioner, Hindu Religious and Charitable Endowments D partment, will take note of it. A copy of this judgment will be forwarded to him for immediate and necessary action.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*G. Ramanujam, J.*

A. Gangadharan .. *Petitioner**

v.

The Government of India, represented by the under Secretary, Department of Labour and Employment, New Delhi and another .. *Respondents.*

Employees' Provident Funds Act (XIX of 1952), section 2-A—Medical journals—Printing Press and Office situated in different premises—Provisions of the Act extended to the press—Whether Act applies to office also—Press and office held to be one unit.

The second respondent firm was carrying on the business of publication of two medical journals at No. 323-24, Thambu Chetty Street, Madras-1, and was also running a printing press at No. 10 of the same street. The printing press was brought under the scope of the Employees' Provident Funds Act, 1952. The petitioner who was a clerk in the office at No. 323-24, Thambu Chetty Street, claimed that the provisions of the Act should be extended to the office also. This was rejected by the Government. The petitioner filed a writ petition challenging the Government's refusal.

Held: There was financial, managerial and functional integrality between the two units and one cannot exist without the other. The fact that the premises where the printing and publishing activities were carried were not adjunct and they were registered under two separate enactments was not quite material in deciding the question as to whether the two activities carried on by the second respondent formed part of one and the same establishment. Even though the transferability test was not satisfied, it could not be said that both the units were two independent and separate units.

*W.P. No. 1972 of 1973. 13*th June*, 1977

The question was to be generally viewed with reference to the relationship between the two units without giving any specified emphasis to any particular test. Therefore, taking all the facts into consideration, the printing press as well as the office establishment looking after the editorial and publication work of the two journals should be treated as a single establishment.

The decision of the first respondent holding that both the printing press and the office establishment were two separate units as they were located at different places could not be sustained especially when the financial, managerial and functional integrity of the two units were admittedly established. [*Para.* 14.]

Cases referred to:

Globe Theatres v. *Labour Court*, (1965) 1 Lab.L.J. 243 ; *Associated Cement Companies Ltd.* v. *Their Workmen*, (1950) 1 Lab.L.J. 1 ; *P.S.N.S. Ambalavana Chettiar & Co.* v. *R.P.F. Commissioner*, (1970) 1 Lab.L.J. 296 : (1969) 2 M.L.J. 160 : 82 L.W. 297 : A.I.R. 1970 Mad. 194; *M.D. Ramakrishna* v. *Tamil Nadu Electricity Board*, (1971) 1 Lab.L.J. 433 ; *Regional P.F. Commissioner* v. *Shree Krishna Metal Mfg., Company*, (1962) 1 Lab.L.J. 427: A.I.R. 1962 S.C. 1536 ; *Mahipal Singh* v. *R.P.F. Commissioner*, (1972) Lab.I.C. 1202.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records on the file of the 1st respondent relating to order bearing No. 5/59/66 PF-11, dated 15th September, 1972 and to quash the order of the 1st respondent bearing No. 5/59/66 (PF-11, dated 15th September, 1972.

A.L. Somayaji, for Petitioner.

S.M. Ali Mohamed Junior Standing Counsel, for Central Government for first Respondent.

K. Ramagopal, for Second Respondent.

The Court made the following

ORDER.—The second respondent, herein is a firm carrying on the busineess of publication of two medical journals "*Antiseptic*" and "*Health*", at No. 323-24, Thambu Chetty Street, G.T. Madras-1, from the year 1904. It is also running a printing press under the name of Antiseptic Press at No. 10, Thambu Chetty Street, G.T.. Madras-1, which was established in the year 1932. The printing press has been brought under the scope of the Employees' Provident Funds and Family Pension Fund Act, 1952 (hereinafter referred to as the Act).from the year 1961. The petitioner herein who is a clerk employed in connection with the publication of the two medical journals at No. 323-24, Thambu Chetty Street, G.T. Madras-1, sought the extension of the provisions of the said Act to the said office at No. 323-24, Thambu Chetty Street, G.T. Madras-1 on the ground that both the printing press and the administrative office are integrated and inseparable units. The Regional Provident Fund Commissioner, Madras, by his letter dated 19th February, 1964 called upon the second respondent to implement the provisions of the Act with effect from 1st February, 1964 to persons employed in the said office. Aggrieved against that the second respondent, however, made a representation to the first respondent under section 19-A of the Employees' Provident Fund Act. The first respondent without affording any opportunity to the employees working in No. 323-24, Thambu Chetty Street, G.T. Madras-1, passed an order treating the press and administrative office as two separate units. The employees of the second respondent filed W.P. No. 605 of 1966 in this Court. This Court allowed athe same and directed the first respondent to dispose of the application of the second respondent under section 19-A afresh after hearing the employees. After hearing the parties, the first respondent by its cryptic order dated 11th September, 1969 held that the printing press and the publishing house of the second respondent should not be treated as one and that as such the Employees' Provident Funds Act was not applicable to the staff working in the administrative office. Thereafter, the employees filed W.P. No. 1023 of 1970 challenging the said decision of the first respondent The said writ petition was allowed and

the matter was remitted to the first respondent for passing a speaking and reasoned order. The first respondent thereafter passed an order dated 15th September, 1972 holding that the office establishment and the printing press of the second respondent are two separate establishments and that the office establishment is not liable to be covered by the Act. The said decision of the first respondent dated 15th September, 1972 has been challenged in this writ petition by the petitioner.

2. The petitioner states that both the establishments *viz.*, the printing press as well as the office establishment are owned by the second respondent, that the office establishment looks after the printing, publication and circulation of the aforesaid two journals, that the accounts relating to the printing press and the publication of the two journals are maintained by the office establishment, that the entire work relating to the printing, publication and circulation of the two medical journals are attended to by it, that the salaries of the employees working both in the printing press and office establishment are paid from out of the subscription and advertisement revenue realised by the office establishment, that the second respondent maintains and prepares only one common balance-sheet and profit and loss account for both the establishments and that the printing press cannot be run without the office establishment and *vice versa*. In view of the above factors, it is contended that both the establishments *viz.*, the printing press and the office establishment shoud be taken as one integrated unit for the purpose of the application of the Act.

3. This claim of the petitioner is opposed by the second respondent-management on the ground that the printing of the medical journals and the editorial and publication work connected therewith are carried on by the two partners on behalf of the firm as two independent and separate establishments, that separate accounts are maintained and separate balance-sheet and profit and loss account have been drawn up, each year, that there is no functional integration of the two establishments and that, in fact, the publication of two magazines have been recognised as separate establishments by various authorities including the income-tax authorities. It is also the case of the second respondent that the workers in the printing press at No. 10, Thambu Chetty Street, G.T., Madras-1, and the employees of the publication department at No. 323-24, Thambu Chetty Street, G.T., Madras, have all along been represented by two separate units, that separate and independent settlements have been entered into by the management with the workers in the printing press and the employees in the office establishment, that the pay scales are different in the two establishments and that therefore the two establishments have to be treated independent of each other.

4. In the impugned order passed by the first respondent, the reasons given for treating the two establishments as separate and independent units are these:

1. The press and the office are located in different premises and are registered under different enactments;

2. There are two separate unions for the press and the office workers;

3. The unity of finance, management and functional integrality between the two units would not attract the provisions of the Employees' Provident Funds and Family Pension Fund Act, 1952;

4. The primary activity of the second respondent is the publication of medical journals *viz.*,

'Antiseptic' and 'Health' and not mere printing; and

5. The office carried on in premises No. 323-24, Thambu Chetty Street, G.T., Madras, is not an adjunct of the printing press carried on in premises No. 10, Thambu Chetty Street, G.T., Madras-1.

5. From the above reasoning given by the first respondent it is clear that there is unity of finance management and functional integrality between the two units as alleged by the petitioner. Even otherwise the facts set out above will make it

abundantly clear that the financial, managerial and functional integrality between the two units cannot at all be disputed. The second respondent is managing both the printing press as well as the editorial and publication work relating to the medical journals. The maintenance of the press as well as the office establishment is from out of the subscription and the advertisement revenue from the publication of the two medical journals; and the printing press cannot be carried without the office establishment and *vice versa*. This will clearly establish the financial, managerial and functional integrality between the two units. The first respondent has taken the view in the impugned order that even though there is financial, managerial and functional integrality between the two units, they cannot be treated as a single unit in view of the fact that both are located in different premises which are not adjunct and registered under different enactments and that there are two separate unions for the press and the office. Therefore, the question is whether the location of the two units in two different premises and its registration under two different enactments will make them the two separate and independent units as has been held by the first respondent.

6. It is contended by the learned counsel for the petitioner that once there is financial, managerial and functional integrality between the two units, they should be treated as one for the purpose of the application of the Act.

7. Ramakrishnan, J., in *Globe Theatres* v. *Labour Court, Madras*[1], culled out the following principle from certain earlier decisions :

> "To decide the question whether two or more units belonging to the same owner or proprietor constitute a single industrial establishment for the purpose of the rule, one must view the matter in the ordinary industrial or business sense, having regard to the scheme and objects of the Act; vide *Associated Cement Companies Limited (Chibesa Cement Works) Jhinkpani* v. *Their Workmen*[1]."

According to the learned Judge to find out whether one or more enterprises constitute one single establishment in the eye of law, the decisive elements are the location of the establishments and their functional integrality that is the existence of one Code relating to the categories of workmen and their scales of wages etc. In *P.S.N.S. Ambalavana Chettiar and Company* v. *R.P.F. Commissioner*[2], the same learned Judge had to deal with somewhat similar question. In that case, a private limited company doing exports and imports business in non-ferrous metals and other commodities had its office at one place and the factory at another place. The question for consideration was whether the factory and the office constitute one house of business so as to form a single establishment. It was found in that case that the business of imports and exports in non-ferrous metals and other commodities was carried on at No. 14, Mint Steet, Madras, and its rolling factory was at No. 7, Nelson Manicka Mudaliar Road, Aminjikarai, which was about five miles away. Thirty workers were engaged in the factory and the Employees' Provident Funds Act was made applicable to the workers in the factory; later; the office establishment in Mint Street was also brought within the scope of the Act by an order of the Regional Provident Fund Commissioner. This was challenged before the High Court. Ramakrishnan, J., held that the word 'establishment' not having been defined in the Act, the question for consideration was to find out whether the factory at Aminjikarai and the office at Mint Street constitute one house of business so as to form a single establishment for the purpose of the Act. An establishment which involves the running of a factory may also require a staff for procuring raw materials and disposing of the manufactured products and also for the maintenance of accounts. Integral relation between all the items of work cannot be ignored in deciding the above question. If the

1. (1965) 1 L.L.J. 243.

1. (1950) 1 L.L.J. 1.
2. (1970) 1 L.L.J. 296 : (1969) 2 M.L.J. 160: 82 L.W. 297 : A.I.R. 1970 Mad. 194.

workers in the Mint Street office are bound to do the work connected with the factory, then the office establishment has to be taken to be part of the factory establishment.

8. In *M.D. Ramakrishnan* v. *Tamil Nadu Electricity Board*[1], Ramaprasada Rao, J., expressed the view that the test to find out whether different organisations of a single industry from part and parcel of one establishment the essential, and no doubt an important test, is whether the employees from one organisation can be transferred to another organisation and if this test of transferability is satisfied, then it can be treated as a single establishment. In that case, a revenue unit in George Town office of the Assistant Engineer, Distribution, Madras Electricity System, was held to be a limb of the establishment of the office of the Superintending Engineer, Distribution, Madras Electricity System in Mount Road and therefore both were treated as forming part of one integrated unit.

9. In *A.C.C. Ltd.* v. *Their Workmen*[2], the Supreme Court had to consider a question whether a company owning a cement factory and a lime stone quarry at two different places could be treated as one unit for the purpose of section 25-E of the Industrial Disputes Act. After expressing the view that whether a particular unit is a part of another establishment is a pure question of fact, the Supreme Court proceeded to say that the raw materials for the cement factory were supplied by the lime stone quarry owned by the same management though situate about a mile and a half from the factory, that the management was maintaining one common account and were looked after by one manager and that the members of the staff were also transferred from quarry to the factory and *vice versa* according to exigencies, that there was general unity of purpose and functional integrality between the limestone quarry and the factory and therefore it should be treated as one establishment for the purpose of section 25-E (*iii*) of the Industrial Disputes Act. According to the Supreme Court the tests which are normally to be applied to decide as to what constitute one establishment would be unity of ownership, management, supervision and control, unity of finance and employment, unity of labour and conditions of service of workmen, functional integrality, general unity of purpose and geographical proximity. The Supreme Court also pointed out that no particular test can be adopted as an absolute and invariable test, that indeed in a large number of cases, several tests may fall for consideration at the same time, and that the test to be adopted to determine the true relationship between the two units should depend on the facts of each case.

10. In *Regional Provident Fund Commissioner* v. *Shree Krishna Metal Mfg. Company*[1], the factory was engaged simultaneously in different industrial activities and one of them was in relation to an industry specified in Schedule I of the Employees' Provident Funds Act, 1952. The factory was engaged in the manufacture of hydrogenated oil or vegetable ghee. It had also a department in the factory wherein the tin containers for storing and packing the manufactured oil were fabricated. The number of workmen employed in the fabrication of tin containers were 31 as against 211 engaged in the manufacture of hydrogenated oil. Further the tin containers were not sold in the market nor the customers who were supplied ghee were charged with the price of the tin containers. On these facts, it was held by the Supreme Court that the factory manufacturing hydrogenated oil or vegetable ghee could not be considered to be engaged mainly in the manufacture of tin containers which was one of the industries specified in Schedule I to the Act at the relevant time. The fabrication of tin containers had been undertaken by the oil mills only as a feeder activity; it was integrally connected with its main business of producing and marketing vegetable oils as such, it was a minor part of the said main activity, and hence the factory cannot be held to be covered by section 1 (3) (*a*) of the Act. Thus, in that case the manufacture of tin contai:

1. (1971) 1 L.L.J. 433.
2. (1960) 1 L.L.J. 1 : (1960) 1 S.C.R. 703: 1960 S.C.J. 1165 : A.I.R. 1960 S.C. 56.

1. (1962) 1 L.L.J. 427 : A.I.R. 1962 S.C. 1536.

-ners was held to form part of the business of vegetable ghee and was not treated as an independent unit.

11. Applying the tests set out in the various decisions referred to above to the facts of the present case, it is seen that except the transferability test, all other tests are satisfied. There has been financial, managerial and functional integrality between the two units and one cannot exist without the other. The fact that the premises where the printing and publishing activities are carried are not adjunct and they are registered under two separate enactments is not quite material in deciding the question as to whether the two activities carried on by the second respondent form part of one and the same establishment. As already pointed out, the Supreme Court has clearly stated that any one of the tests cannot be taken to be absolute and indispensable. Therefore, even though the transferability test is not satisfied, it cannot be said that both the units are two independent and separate units. As pointed out by the Supreme Court, the question is to be generally viewed with reference to the relationship between the two units without giving any specific emphasis on any particular test. Therefore, taking all the facts into consideration, the printing press as well as the office establishment looking after the editorial and publication work of the two journals should be treated as a single establishment.

12. The reasoning given by the first respondent that since the premises are not adjunct and that they have two separate unions and therefore, it should be treated as two separate units is not quite convincing. The fact that there are two unions cannot be taken to be a conclusive factor indicating that the two units are separate and independent.

13. The learned counsel for the second respondent referred to the decision in *Mahipal Singh* v. *Regional Provident Fund Commissioner*[1], and contended that an employer can have two or more independent establishments under his control and employing less than 20 persons in each of them without attracting liability to contribute to the provident fund under the Act, and that in our present case, as the office establishment at No. 10, Thambu Chetty Street, G.T., Madras-1, does not engage more than 20 persons, it cannot be brought within the coverage of the Act. I do not see how the said decision will help. The first respondent in that case, a partnership concern, was carrying on three businesses *viz.*: (1) Commission agency business in cigarettes, petrol and kerosene oil; (2) Commission agency business in foodgrains; and (3) oil-mill called Shri Shankar Oil Mill. The said three businesses were located in three different places and employed less than 20 persons in each. The Regional Provident Fund Commissioner took the view that though each of the business employed less than 20 persons, since the first petitioner concern employed more than 20 persons in all the three businesses it was liable to pay the provident fund contribution under the Act and the Scheme framed thereunder. The said order of the Provident Fund Commissioner was challenged in a writ petition. The Mysore High Court held:

> " On a careful residing of the Act, we are of the opinion that an employer having two or more establishments under his control and employing less than twenty persons in each of them, even though the total number of employees in all the establishments exceeds twenty, he would not be liable to pay any contribution under the Act. That appears to be the true interpretation of the provisions of the Act. If the intendment of the Act was that every employer employing twenty or more employees was liable to pay the provident fund contribution irrespective of the fact whether they are all employed in the same establishment or not, the Act would have stated so and that there would have been no need to enact section 2-A also."

In that case all the three activities carried on by the first petitioner were treated as separate and independent and, therefore, it was held that the adding up the number of employees in all the businesses was not possible. But, in this case, one of the activities, *i.e.*, printing press is already covered by the Act and the only question

1. (1972) Lab. I.C. 1202.

is whether the printing press and the office establishment form part of the same establishment. Once it is shown that the office establishment and the printing press form part of the same establishment, the conclusion is inescapable that both the activities should be brought under the coverage of the Act as one establishment. The above decision of the Mysore High Court is not applicable to the facts of this case.

14. The decision of the first respondent holding that the both printing press and the office establishment are two independent units merely because there are two separate unions and they are located at different places cannot be sustained especially when the financial, managerial and functional integrity of the two units have admittedly been established. The order of the first respondent, has, therefore, to be set aside and the writ petition allowed. Accordingly, this writ petition is allowed. There will, however, be no order as to costs.

15. In view of the findings given above, the question as to which of the two activities is the main activity for purpose of the application of the Act is left open.

S.J. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*M. M. Ismail, J.*

M. C. Manickam Chettiar .. *Appellant**

v.

The Madras City Municipal Corporation by its Commissioner .. *Respondent.*

Indian Contract Act (IX of 1872), sections 2 (d), 4, 5 and 6—Suit for damages—Auction of collecting fees held by Corporation of Madras—Bidder depositing bid amount—Acceptance of bid not communicated by Corporation for nearly two months—Bidder revoking bid and demanding return of deposit—Acceptance of bid after revocation by bidder whether valid—Bidder whether to keep offer open till acceptance—Handing over of a copy of agreement to be entered into whether amounts to consideration—Revocation held to be properly made and there was no acceptance before revocation—Held there was no consideration and therefore the bidder was not bound to keep the offer open.

The Madras City Municipal Corporation held an auction for the right to collect the fees at a Swimming Pool. *M* was a bidder at the auction. The conditions of auction were contained in Exhibit B-2 and the auction was held on 17th January, 1968. Exhibit A-2 was the form of agreement to be entered into in the event of the bid being accepted and this was handed over to *M* on 17th January, 1968. Since there was no accept nce, *M* wrote Exhibit A-5 dated 16th March, 1968 revoking the bid made by him and asked for the return of the deposit of Rs. 1,000 made by him. Exhibit B-3 was a communication dated 18th March, 1968 which was unsigned by which the Commissioner of the Corporation accepted the bid of *M*. By Exhibit A-4 dated 19th March, 1968, *M* wrote to the Corporation rejecting the acceptance and insisted on the return of deposit. The Commissioner replied by Exhibit B-4 by which *M* was informed that the deposit would not be refunded that there would be a reauction

*A.S. No. 133 of 1972. 22*nd September,* 1975.

at the risk and cost of *M*. The Corporation held the re-auction and claimed damages from *M* and filed a suit against *M* for damages. The suit was decreed, and the trial Court held that *M* could not revoke the bid offer, the re-auction was not vitiated by any factor and that *M* was bound to keep the offer open till acceptance. *M* appealed.

Held: The communication of the revocation of the offer was complete before the communication of the acceptance of the Corporation, and consequently, the revocation of the offer became effective. [*Para.* 8.]

The respondent was a statutory Corporation, and any action taken on behalf of that Corporation should be in writing signed by a competent officer who had the capacity to bind the Corporation by his action. So long as Exhibit B-3 remained unsigned, it could be said that there was no acceptance of the offer at all, and therefore, the revocation of the offer made by the appellant by his communication Exhibit A-3 received by the Corporation on 19th March, 1968 had become completely effective. [*Para.* 9.]

The mere handing over of a copy of the agreement would not constitute consideration to support a promise or undertaking of the bidder to keep his bid open till final acceptance or to make it irrevocable. [*Para.* 15.]

It was the mandate of the law that an agreement not supported by consideration was unenforceable, and this mandate could not be defeated by contending that the party against whom the agreement was sought to be enforced, entered into the same with the knowledge that there was no consideration or that the consideration provided for was unreal or illusory. [*Para.* 16.]

The undertaking on the part of a bidder as contained in clause (2) of Exhibit B-2, to keep open the offer till its acceptance or to make it irrevocable was not supported by consideration, as understood in the law of contract, and hence the appellant herein was not bound to keep his offer open till acceptance and was entitled to revoke the same before acceptance on the part of the Corporation. The appellant had revoked the offer before its acceptance and he could not be mulcted with any damages on account of any short-fall in the re-auction conducted by the Corporation. On the other hand, he was entitled to the refund of the bid deposit made by him. [*Para.* 18.]

Cases referred to :

T. Linga Gowda v. *State of Madras*, (1970) 1 M.L.J. 503 : A.I.R. 1971 Mad. 28; *Somasundaram Pillai* v. *Provincial Government of Madras*, I.L.R. (1947) Mad. 837 : 60 L.W. 110 : (1947) 1 M.L.J. 123 : A.I.R. 1947 Mad. 366; *Currie* v. *Misa*, (1875) L.R. 10 Ex. 153; *Bunn* v. *Guy*, (1803) 4 East 190; *Thomas* v. *Thomas*, (1842) 2 Q.B. 851; *Bolton* v. *Madden*, (1873) L.R 9 Q.B. 55; *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co. Ltd.*, (1915) A.C. 847; *Chappel & Co. Ltd.* v. *Nestle Co., Ltd.*, (1960) A.C. 87.

Appeal against the decree of the City Civil Court, Madras, in O.S. No. 4133 of 1969.

N. Palaniappan and *S. Umachandran*, for Appellant.

R. Thillai Villalan, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in O.S. No. 4133 of 1969 on the file of the City Civil Court, Madras, is the appellant herein. The suit was instituted by the respondent for recovery of a sum of Rs. 9,450, as damages under the following circumstances. The respondent, namely, the Madras City Municipal Corporation by its Commissioner, hereinafter called the Corporation, is the owner of the swimming pool known as the 'Royal Swimming bath' at Peoples Park. The right to collect the fees from the persons using the pool was auctioned for the period of one year from 1st April, 1968 to 31st March, 1969 on 17th January, 1968. The appellant was the highest bidder for Rs. 20,000. According to the respondent, the same was accepted by the Commissioner by his letter dated 18th

March, 1968, addressed to the appellant. The plaint proceeded to state that one of the conditions in the auction notice is that if the officer conducting the auction does not return the bid deposit, the bidder must keep the bid open for acceptance and the bid will be irrevocable, and if the bidder withdraws his bid before acceptance by the Commissioner or if his bid is accepted and he fails to furnish the security or execute the agreement, then in each and every such case his bid deposit will be forfeited to the Corporation and the right resold in public auction and the bidder will be liable to pay the damages suffered by the plaintiff-Corporation on account of such resale of the collection of fees departmentally. According to the respondent-Corporation, the appellant declined to take up the contract and requested for the refund of deposit by his letter dated 19th March, 1968 and the respondent had to reauction the right by public auction at the risk and cost of the appellant. The respondent further stated that on 28th March, 1968 the auction was held and one Thiagaraja Chettiar made the highest bid for Rs. 9,550, that the said bid was accepted by the Commissioner of the Corporation and that the amount was also realised. The case of the Corporation was that as a result of the default committed by the appellant, the Corporation suffered a loss of Rs. 10,450. After adjusting the bid deposit of Rs. 1,000, paid by the appellant, for recovery of the balance the suit was instituted.

2. The case of the appellant in the written statement was that it was true that he bid at the auction and that his highest bid was Rs. 20,000. But, according to him, he was not liable to pay any damages to the respondent-Corporation. He contended that after the auction was held on 17th January, 1968, nothing was heard from the Corporation regarding the acceptance of the bid for two months, that he called upon the Corporation to refund the bid deposit by his letter dated 16th March, 1968, and that thereby he validly revoked the bid by saying that he was not prepared to wait any longer and that his bid deposit must be refunded. His further case was that he sent another letter dated 19th March, 1968, revoking his bid, that the respondent purported to accept the appellant's bid in the letter dated 19th March, 1968, only after the appellant asked for the refund of bid amount by his letter dated 16th March, 1968 and made known to the respondent that he revoked his bid; that there was no obligation on the part of the appellant to keep his bid open; and that there was no consideration for keeping his offer open indefinitely. He also contended that his bid had lapsed on account of the undue delay in acceptance on the part of the respondent, that no contract came into existence and the appellant was entitled to refund the bid deposit of Rs. 1,000, and that the respondent was not entitled to forfeit that amount. He also alleged *mala fides* against the Corporation stating that instead of accepting the bid of the appellant, the Corporation entered into negotiations with one M. Koteeswaran for a higher bid of Rs. 21,000, and thereby the Corporation itself had given a go-by to the auction held on 17th January, 1968. He further stated that the attempt of Koteeswaran to get the contract was frustrated and that the Corporation cannot claim damages on the foot of short-fall, in re-auction. He also challenged the validity of re-auction. He paid Court-fee for the refund of the bid deposit of Rs. 1,000 with interest of Rs. 100.

3. The Corporation filed a reply statement controverting the allegations of the appellant in his written statement and reiterating its earlier claim. On the basis of these pleadings, the following issues were framed for trial:

1. Is the plaintiff entitled to forfeit the deposit?

2. Was there an obligation on the defendant to keep his bid open?

3. Is the plaintiff entitled to any damages, and if so, what amount?

4. Has the defendant's bid lapsed on account of non-acceptance within a reasonable time and by plaintiff negotiating with non-bidders subsequent to the auctions?

5. Was there a valid revocation of the defendant's bid prior to the plaintiff's acceptance?

6. Was the re-auction vitiated by absence of the publicity and the defendant not liable for any loss on such re-auction?

7. Is the defendant entitled to the refund of the deposit of Rs. 1,000 with interest thereon?

8. To what reliefs, if any, are the parties entitled?

The learned VII Asst. Judge, City Civil Court, Madras, by his judgment and decree dated 25th November, 1971, held that the appellant was under an obligation to keep his bid open for acceptance, and therefore, he had no right to revoke his bid before the acceptance of the same by the Commissioner on 18th March, 1968. He also held that the re-auction was not vitiated by any factor and that the offer of the appellant did not lapse on account of non-acceptance of the bid within a reasonable time and by the Corporation negotiating with non-bidders subsequent to the auction. According to his finding, there was necessity to verify the solvency of the appellant which took time and that was the reason for the delay in accepting the bid of the appellant and the delay would not enable the appellant to revoke his bid. The learned trial Judge went to the extent of holding that the revocation of the offer by the appellant was not *bona fide* since he revoked the offer knowing that the Commissioner had accepted his offer on 15th March, 1968 and that as a matter of fact even the subsequent highest bidder Thiagaraja Chettiar was set up by the appellant only. On these findings, the learned trial Judge decreed the suit of the Corporation as prayed for with costs and the counter-claim of the appellant was dismissed, but without costs. It is against this judgment and decree that the defendant in the suit has preferred this appeal contending that he was not liable to pay any damages to the Corporation and that he was entitled to get refund of the bid deposit made by him.

4. Having regard to the facts and circumstances of this case, it is unnecessary to consider whether the appellant purported to revoke his bid after having come to know that the Commissioner has accepted the offer on 15th March, 1968 or whether the subsequent highest bidder, Thyagaraja Chettiar was set up by the appellant or not. The sole question that arises for consideration is, whether the appellant validly revoked his offer or not. That again turns upon two questions, namely: (1) whether the appellant did revoke his offer or not; and (2) whether the appellant was under an obligation to keep his bid open without revoking the same, till it was accepted by the Commissioner. I shall now consider these questions, and for considering these questions, it is necessary to refer to certain facts.

5. The first thing I want to refer to is Exhibit B-2, conditions of the auction itself conducted on 17th January, 1968. Clause (1) of Exhibit B-2, dated 12th December, 1967, states that it must be clearly understood that a bid made by any person is an offer and the Commissioner is not bound to accept the highest or any other bid. It is this clause which provides for making of the bid deposit in cash before any person takes part in the bid, and it is stated that the said security deposit will not carry any interest. Clauses 2 and 3 are important and they are as follows:—

"2. If the Officer conducting the auction returns the bid deposit it is to be understood that the bid or the offer is not accepted. If the officer does not return the bid deposit, the bidder must keep his bid open for acceptance, and the bid will be irrevocable and as consideration for keeping the bid irrevocable he will be furnished with a copy of the agreement which is to be entered into by the bidder whose bid is accepted.

3. The Commissioner is entitled to call on any bidder whose bid deposit is not returned, to pay the balance of the amount to make up the security deposit or such sum as the Commissioner may fix within a time to be fixed by him as a condition precedent to the acceptance of the bid. In

default, the bid will stand rejected at the risk and cost of the bidder. The person whose bid is accepted will have to produce: (1) an Income-tax verification certificate; (2) a sales tax clearance certificate; and (3) execute a formal agreement of a copy which will be furnished to him."

6. In this case, after the auction was held on 17th January, 1968, the bid deposit of the appellant herein was not returned as contemplated by clause (2) of Exhibit B-2. Exhibit A-2 is the form of agreement to be entered into between the parties in the event of the appellant's bid being accepted, which was handed over to the appellant herein on 17th January, 1968, namely, the date of auction. Exhibit A-5 is a communication which bears the date "16th March, 1968" sent by the appellant to the Corporation. This reads:—

"The auction with right of collecting fee from the persons using the Royal Swimming pool for the year 1968-69 was held on 17th January, 1968. Now it is more than two months, and as I cannot wait any longer I request you to refund the bid deposit of Rs. 1,000 paid by me at your earliest."

Though it bears the date "16th March, 1968," it bears the seal of the Corporation dated 19th March, 1968. Exhibit B-3 is the alleged acceptance sent by the Commissioner to the appellant herein. It bears the date "18th March, 1968," and it is unsigned. This communication states that the Commissioner has accepted the appellant's bid for Rs. 20,000 and asks the appellant to arrange to remit: (1) a sum of Rs. 4,000 in cash towards the balance of security deposit fixed by the Commissioner for the due performance of the contract; and (2) to execute an agreement within two days from receipt thereof. It also states that in default, the appellant's bid deposit of Rs. 1,000 will be forfeited. Exhibit A-10 is the acknowledgment for the receipt of Exhibit B-3 which shows that it was served on the appellant on 19th March, 1968 at 4-30 P.M. Exhibit A-9 is the office copy of Exhibit B-3, and that shows that though it was prepared on 18th March, 1968, it should have been despatched only on 19th March, 1968. After the receipt of Exhibit B-3, the appellant sent a further communication, Exhibit A-4, dated 19th March, 1968, which appears to have been received in the Corporation the next day, that is, 20th March, 1968. In that communication, the appellant referred to his letter dated 16th March, 1968 (Exhibit A-3), and stated that he was not prepared to accept the offer which was received after two months. He, therefore, requested in that letter that the deposit amount of Rs. 1,000 might be refunded to him at an early date. Exhibit B-4 is the reply to Exhibit A-4 sent by the Corporation to the appellant herein stating that his request for refund of the bid deposit in respect of the auction in question could not be complied with and that the right had been brought to re-auction at his risk and cost. It is thereafter, after exchange of notices, that the present suit was instituted by the respondent.

7. The first question for consideration is, whether the appellant actually revoked the offer or not. According to the appellant, he presented Exhibit A-3 on 16th March, 1968 itself to the Revenue Officer in person. However, as I have pointed out already, Exhibit A-3 contains the Corporation seal, dated 19th March, 1968. There being no evidence to corroborate the case of the appellant in this behalf, I must proceed on the basis that Exhibit A-3 was received by the Corporation only on 19th March, 1968. The other question for consideration is, whether Exhibit A-3 constitutes revocation of the offer as such. This question arises in view of the doubt expressed by the learned trial Judge that Exhibit A-3 may not amount to revocation of the offer. I am unable to accept the conclusion of the learned trial Judge, because it is not necessary that Exhibit A-3 itself should have used the expression "Revocation of the offer" and it is enough if Exhibit A-3 made it clear that the appellant was not standing by the offer made by him and that he was withdrawing from the offer. The request contained in Exhibit A-3 which I have extracted in full clearly shows that the appellant herein had manifested his intention not to stand by the offer made by him, in view of

the delay involved and that was made amply clear when he requested for the refund of the bid deposit of Rs. 1,000. Therefore, I have no hesistation whatever in coming to the conclusion that Exhibit A-3 received by the Corporation on 19th March, 1968, did constitute revocation of the offer made by the appellant. The evidence of P.W. 1 also shows that even the Corporation understood Exhibit A-3 only as a revocation of the offer made by the appellant.

8. The question that arises for consideration in this context, is whether this revocation of the offer was effective or not. Section 4 of the Indian Contract Act, deals with communication of the proposal, acceptance and revocation. Section 5 deals with revocation of proposals and acceptance, and section 6 provides how a revocation should be made. According to section 4, the communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete—as against the person who makes it, when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge. The question for consideration is, whether the communication of the revocation of the offer of the appellant herein became ineffective within the terms of section 4 of the Indian Contract Act. As I have pointed out already, Exhibit A-3 was received at the office of the Corporation on 19th March, 1968. The evidence of P.W. 1 shows that it was received by post, and he stated that the postal cover which contained Exhibit A-3 was not preserved. As against this, Exhibit B-3 was served on the appellant by a special messenger at 4-30 P.M. on 19th March, 1968. There is no evidence to show that Exhibit A-3 was received by the Corporation after Exhibit B-3 was served on the appellant herein. On the other hand, the evidence of P.W. 1 would show that Exhibit B-3 itself was sent from the office of the Corporation only on receipt of Exhibit A-3. The evidence of P.W. 1 is this behalf is as follows:-

> "The defendant sent a letter (Exhibit A-3) dated 16th March, 1968, and it was received in my office on 19th March, 1968. He stated that the contract was revoked by him due to delay in acceptance. On the same day (19th March, 1968), Exhibit B-3, letter of the plaintiff was sent to defendant stating that the contract was accepted even on 15th March, 1968."

The tenor of the above evidence of P.W. 1 will show that Exhibit B-3 was despatched from the office of the Corporation only after the receipt of Exhibit A-3. As a matter of fact, the statement of P.W. 1 that Exhibit B-3 was sent to the defendant stating that the contract was accepted even on 15th March, 1968 will confirm this. However, Exhibit B-3 does not contain any statement that the offer of the appellant was accepted by the Commissioner on 15th March, 1968. Thefore, these circumstances taken along with the tenor of the above evidence of P.W. 1, will clearly show that Exhibit B-3 should have been despatched from the office of the Corporation through a special messenger on 19th March, 1968: after the receipt of Exhibit A-3 only. But P.W. 1, immediately after making the above statement, went on to state—

> "Before the receipt of Exhibit A-3 in my office, Exhibit B-3 was despatched to the defendant though on one and the same date."

Obviously, this statement was not acceptable. As far as the communication of the said acceptance is concerned, it was complete as against the person who made it only when it was served on the appellant herein at 4-30 P.M. on 19th March, 1968; because, it was sent through a special messenger, the special messenger could have been countermanded not to deliver Exhibit B-3 to the appellant herein at any time before he actually delivered the same to him. On the other hand, P.W. 1, as I have pointed out already, admitted that Exhibit A-3 was received through post, and therefore,

it must have been received by the Corporation on 19th March, 1968 before Exhibit B-3 was despatched from the office of the Corporation. Hence, my conclusion on this part of the case is that the communication of the revocation of the offer was complete before the communication of the acceptance of the Corporation, and consequently, the revocation of the offer became effective.

9. There is one other circumstance also to which I would l ke to draw attention in this behalf. As I have pointed out already, Exhibit B-3 is the acceptance sent by the Corporation to the appellant herein, and Exhibit A-9 is the office copy of Exhibit B-3. As far as Exhibit B-3 is concerned, it is a cyclostyled communication purporting to have been prepared on 18th March, 1968. But, it contains nobody's signature. On the other hand, Exhibit A-9 the office copy contains the initials of the Revenue Officer under date 19th March, 1968, though there are some endorsements to indicate that it might have been prepared on 18th March, 1968. So far as Exhibit B-3 remains unsigned, it cannot be said that there has been a valid acceptance communicated to the appellant herein of his offer. It should not be forgotten that the respondent is a statutory Corporation, namely, Municipal Corporation of Madras, and any action taken on behalf of that Corporation must be in writing signed by a competent officer, who has the capacity to bind the Corporation by his action. So long as Exhibit B-3 remains unsigned, it can be said that there has been no acceptance of the offer of the appellant at all, and therefore, the revocation of the offer made by the appellant by his communication, Exhibit A-3 received by the Corporation on 19th March, 1968 has become completely effective.

10. One argument that was st enuously addressed before me and which found favour with the trial Court was that the appellant had no right to revoke the offer at all. For this purpose reliance was placed on clause (2) of Exhibit B-2, which I have already extracted. According to that clause, a bidder whose bid deposit is not returned must keep his bid open till acceptance by the Commissioner, and as, consideration for keeping that offer open, he would be given a copy of the agreement to be entered into between the parties, and in this particular case Exhibit A-2 is the copy of that agreement, and such a copy of the agreement having been given to the appellant herein, the appellant was not entitled to revoke his offer. Even if this argument is valid, we are left with a curious situation in this case, namely, there being no valid acceptance of the offer at all, because, Exhibit B-3 was an unsigned cyclostyled communication, the appellant must be deemed to have kept his offer open indefinitely irrespective of any other consideration. On the face of it, such a contention is not tenable.

11. I am now proceeding to consider this question on the basis that Exhibit B-3 was a valid acceptance. The question in this behalf is whether the appellant herein was under an obligation to keep his offer open. The legal position in this behalf is settled, and is not challenged before me.

12. This Court in *T. Linga Gowder* v. *State of Madras, represented by the Dt. Forest Officer, Ootacamaund*[1], following an earlier judgment of this Court in *Somasundaram Pillai* v. *Provincial Government of Madras*[2], held that in an auction sale a condition stipulating that the bid shall not be retracted, has no force unless it is supported by consideration or is founded on statutory authority, because every bid is an offer and it binds both parties only when the offer is accepted, and that a person who made the offer has a right to withdraw the offer before its acceptance. In the present case, it is not the case of either party that Exhibit B-2 and in particular clause (2) thereof was pursuant to any statutory power. Therefore, the only other question that remains to be considered is whether the provision contained in Exhibit B-2 that a bidder whose bid deposit was not returned should keep his offer open and it is irrevocable, is supported by any consideration or not.

1. (1970) 1 M.L.J. 503 : A.I.R. 1971 Mad. 28.
2. I.L.R. (1947) Mad. 837 : (1947) 1 M.L.J. 123 : 60 L.W. 110 : A.I.R. 1947 Mad. 366.

The argument of the learned counsel for the Corporation is that the handing of the form of agreement to be entered into between the parties, namely, Exhibit A-2 in the present case, would constitute consideration, and this argument has found favour with the learned trial Judge. The correctness of the above submission as well as the conclusion of the learned trial Judge has now to be considered. I am clearly of the opinion that the argument as well as the conclusion of the trial Court in this behalf is not sound. Section 2 (*d*) of the Indian Contract Act defines 'consideration' as follows:—

> " When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something such act or abstinence or promise is called a consideration for the promise".

Various decisions and text books writers have dealt with the 'conception of consideration.' In Anson's 'Principles of the English Law of Contract', 22nd Edn., it is stated—

> " It will be well, therefore, to start with a definition of consideration, and we may take that which is given by Lush, J. in the case of *Currie* v. *Misa*[1]. 'A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' Gratuitous promises are thus unenforceable in English Law; reciprocity is required by the presence of consideration. It will be seen from this definition that consideration either is some benefit to the promisor or some detriment to the promisee; but there is considerable controversy as to the relative importance of these two factors. It is universally conceded that detriment to the promisee is a good consideration since detriment is, as one learned writer has succinctly stated, the price for which the prmise of the other is bought (pages 80-81).
>
> In each case we must ask : Does the promisor get any benefit or the promisee sustain any detriment, present or future, in respect of the promise? If no, the promise is gratuitous, and is not binding. In working out this doctrine to its logical results it has, no doubt, happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule (page 85).
>
> Consideration need not be adequate to the promise but it must be of some value in the eye of the law. The Courts will not make bargains for the parties to a suit, and, if a man gets what he contracted for, will not inquire whether it was an equivalent to the promise which he gave in return. The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee; in any case the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced'. The most trifling detriment or benefit will suffice (page 91).
>
> Though consideration need not be adequate it must be real. It must be something which is of some value in the eye of the law. (page 92)."

1. (1875) L.R. 10 Ex. 153, 162.

13. To the same effect were the statements of law contained in other text books as well. In Chitty on Contracts'—23rd Edn. Vol. 1 it is stated—

> " The general rule both at common law and in equity is that the Courts do not concern themselves with the adequacy of the consideration. They leave the parties free to make their own bargain, and they refuse, generally speaking, to invalidate a contract on the ground that it is 'unfair'. The fact that a contracting party pays 'too much' or 'too little' may be evidence of fraud or mistake, or may induce the Court to imply a warranty. But it does not affect the validity of the contract at common law—though gross undervalue may sometimes be a ground for equitable

relief (paragraph 119, pages 59-60). Although consideration need not be adequate, it must be real, that is capable of estimation in terms of value; of some value in the eye of law (paragraph 120, page 61)."

In Cheshire and Fifoot's "Law of Contract", 8th Edn. at page 59, the following definitions culled out from certain decisions have been given—

"A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself—Lord Ellenborough in *Bunn* v. *Guy*[1].

Consideration means something which is of value in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff or some benefit to the defendant—Patteson, J., in *Thomas* v. *Thomas*[2].

The general rule is that an executory agreement by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is either for the benefit of the defendant or to the trouble or prejudice of the plaintiff—Per Lord Blackburn in *Bolton* v. *Madden*[3].

In *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge and Co., Ltd.*[4], Lord Dunedin adopted the following definition of 'consideration' contained in Pollock on Contracts, 8th Edn., Page 175—

"An act or forbearance of one party; or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Dealing with the adequacy of consideration, the same text book (Cheshire and Fifoot's Law of Contract, 8th Edn.) states at page 69 thus—

"It has been settled for well over three hundred years that the Courts will not inquire into the adequacy of consideration. By this is meant that that they will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems to be unfair. The promise must, indeed, have been procured by the offer of some return capable of expression in terms of value."

In the light of these statements contained in the various text books, the question for consideration is, whether the handing over of Exhibit A-2, a copy of the agreement to be entered into between the parties in the event of the offer being ultimately accepted by the Corporation, can be said to constitute consideration for the offer or keeping the offer open and irrevocable till its acceptance. I am clearly of the opinion that this cannot be said to be consideration in the eye of law. Notwithstanding the handing over of a copy of the agreement to the appellant, the Commissioner of the Corporation has retained the undoubted power to reject the offer of the appellant herein. Therefore, by the handing over of Exhibit A-2, the Corporation had not suffered any detriment and had not undertaken any obligation which it did not have previously. As against this, by receiving the copy of the agreement, the appellant had not gained any advantage or benefit. His bid deposit remained with the Corporation without earning any interest, and if and when his offer was rejected by the Commissioner which he was entitled to do, the appellant would merely get back the bid deposit, and he does not get anything more than what he had previously, by (*sic*) receiving the copy of the agreement from the Corporation. Hence, this handing over by the Corporation and receiving by the appellant of Exhibit A-2 does not have any value in the eye of law, which can be only in terms of acquisition of some right or benefit by the appellant or incurring of some obligation or suffering of some detriment by the Corporation, neither of which is present in the present case.

14. Apart from this, there are certain other things also to be noticed in this context. It is not as if Exhibit B-2 provides

1. (1803) 4 East. 190.
2. (1842) 2 Q.B. 851.
3. (1873) L.R. 9 Q.B. 55.
4. (1915) A.C. 847, 855.

for the handing over of such copy only to the highest bidder. I have already extracted clauses (2) and (3) of Exhibit B-2, and they give complete discretion to the officer conducting the auction to return or not to return the bid deposit of any person. It may be in a particular case, the officer conducting the auction does not return the bid amount of any of the persons and places the entire matter before the Commissioner for consideration, and in the process hands over a copy of the agreement to every one of the persons who participates in the bid. Can it be contended from this fact that every one of the persons who participated in the bid was under an obligation not to revoke the bid and to keep the bid irrevocable ? As a matter of fact, it may happen in a particular case that the difference between the highest bid and the next lower bid or even further lower bids may not be very much, and such difference may not be sufficient to justify the Commissioner accepting the highest bid, irrespective of the relative solvency and status of the parties concerned. Therefore, in order to avoid the necessity of conducting a re-auction, the officer conducting the auction may place the offers of a few in the top before the Commissioner for consideration and with regard to those people, their bid deposits may not be returned, and each one of them may be given a copy of the agreement as contemplated in Exhibit B-2. If the argument of the learned counsel for the respondent is to be accepted, in the case of every one of those persons the offer remained irrevocable, and the only consideration for keeping them open and irrevocable was the receiving of a copy of the agreement to be entered into later. From the very nature of the case, though several persons have been given copies of the agreement, the offer of one of them only can be ultimately accepted, and with regard to others, they will be merely getting back the bid deposit which itself does not carry any interest. Can it be said, in such a context, that in the case of every one of them, there was consideration for their not revoking the offer—a consideration which has some value in the eye of law ? That the copy of the agreement handed over to the bidder is worthless to the bidder is apparent from clause (2) itself. Under that clause, after the Commissioner has accepted the bid, a copy of the formal agreement to be executed by the bidder will be furnished to him. This itself will make the copy handed over earlier useless and worthless.

15. Under these circumstances, I am clearly of the opinion that the mere handing over of a copy of the agreement will not constitute consideration to support the promise or undertaking of the bidder to keep his bid open till final acceptance or to make it irrevocable.

16. The learned counsel for the respondent contended that even if it be so, the appellant having participated in the auction with the knowledge of clause (2) in Exhibit B-2, he must be held to be bound by it. I am unable to acept that argument. Even when a person enters into an agreement with somebody else, if ultimately it is found that the agreement is not supported by consideration, certainly the agreement cannot be enforced in law and it is no answer to say that the person entered into the agreement with the knowledge that it did not provide for any consideration. It is the mandate of the law that an agreement not supported by consideration is unenforceable, and this mandate cannot be defeated by contending that the party against whom the agreement is sought to be enforced, entered into the same with the knowledge that there is no consideration or that the consideration provided for is unreal or illusory. Therefore, simply because the appellant participated in the auction with the knowledge of clauses (2) and (3) of Exhibit B-2, it cannot be contended that even if there is no consideration, be must be bound to keep his offer open or irrevocable till its acceptance.

17. The learned counsel for the respondent-Corporation drew my attention to a decision of the House of Lords in *Chappel & Co., Ltd.* v. *Nestle Co., Ltd.*[1]. The facts of this case are somewhat interesting and peculiar. The facts as gathered from the headnote are as follows :

The Hardy Record Manufacturing. Co. manufactured and sold to the Nestle Co. who were manufacturers of milk chocolate a number of a gramophone records.

1. (1960) A.C. 87.

of a work which was 'musical' within the meaning of the Copyright Act, 1956, and the copyright of which belonged to the appellants.' The recording was made on a thin film of cellulose acetate adapted for (*sic*) mounting on cardboard discs which were supplied by the Nestle Co., and bore matter advertising their chocolate, the price charged to the N stle Co., being four pence per record. The Nestle Co., advertised the records for sale to the public at the price of 1s, 6d each, but with a stipulation to the effect that intending purchasers must in respect of each record send, in addition, three wrappers from six penny packets of their milk chocolate. The Company made a profit on each transaction. The wrappers when received were worthless and were thrown away. The question that came up for consideration was whether for the purpose of section 8 of the Copyright Act, 1956, the transactions in question could be said to be sales by retail. That section provided for, in the case of a record which is sold by retail, the manufacturer paying to the owner of the copyright in the prescribed manner and at the prescribed time by way of royalty, an amount equal to 6¼% of the ordinary retail selling price of the record. In this particular case, the Nestle Co., Ltd., had advertised as follows :—

> " Here's how to get each new star's record. Collect three six penny wrappers from Nestle's milk chocolate. Fill in the coupon and sen it with a postal order for 1s. 6ds. the price of the record. and your three wrappers. You may order as many record as you like on this coupon, but for each record you must send three wrappers and 1s. 6d., P.O. crossed, payable to the Nestle Co. Ltd."

The question for consideration was whether the three wrappers of Nestle's milk chocolate could be said to form part of the retail price in addition to 1s.6d., which the purchaser was required to pay. Lord Reid stated—

> "The requirement that wrappers should be sent was of great importance to the Nestle Co.; there would have been no point in their simply offering records for 1s 6d. each. It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records. It is a perfectly good contract if a person accepts an offer to supply goods if he (*a*) does something of value to the supplier, and (*b*) pays money the consideration in both (*a*) and (*b*) . There may have been cases where the acquisition of the wrappers conferred no direct benefit on the Nestle Co., but there must have been many cases where it did. I do not see why the possibility that in some cases the acquisition of the wrappers did not directly benefit the Nestle Co., should require us to exclude from consideration the cases where it did. And even where there was no direct benefit from the acquisition of the wrappers there may have been an indirect benefit by way of advertisement."

Lord Somervell of Harrow stated—

> " The question then is whether the three wrappers were part of the consideration or, as Jenkins, L.J. held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store.
>
> I think they are part of the consideration. They are so described in the offer. 'They' the wrappers, will help you to get smash his recordings. They are so described in the record itself— " all you have to do to get such new record is to send three wrappers from Nestle 6 d milk chocolate bars, together with postal order for 1s 6 d. This is not conclusive but, however described, they are in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestle's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems, to me wrong not to treat the stipulated evidence of such sales as part of the consideration."

18. With regard to this case, it is stated in Anson's Principles of the English Law of Contract—22nd Edn., as follows:—

"The question for decision was: Did the wrappers form part of the selling price (consideration)? Or was their acquisition simply a condition limiting the class of persons qualified to purchase records? The House of Lords, by a bare majority, held that they were part of the consideration for the record. Since the object of selling the record was to increase the sales of chocolate the stipulated evidence of such sales formed part of the consideration. The wrappers were of benefit to the promisors (page 83)."

In my opinion, there is no comparison between the wrappers of the three chocolate bars considered in the decision referred to above, and the handing over of a copy of the agreement to be entered into between the parties in the event of the Commissioner of the Corporation ultimately accepting the offer of the person concerned in the present case. In the decision referred to above, if a person were to send three wrappers of chocolate bars, he should have purchased three bars of chocolate, and therefore, even if the wrappers themselves were not of any value to Nestle and Co., the purchase of three bars of chocolate which was evidenced by the three wrappers was certainly of value to Nestle and Co., while in the present case, the handing over of a copy of the agreement to the appellant herein was not of any value whatever, because, it did not add a whit to his prior existing right or obligation and has not in any way altered his position in law with regard to his offer, the acceptance or rejection of his offer being exclusively at the discretion of the Commissioner of the Corporation. Therefore, I am clearly of the opinion that the undertaking on the part of a bidder as contained in clause (2) of Exhibit B-2, to keep open the after till its acceptance or to make it irrevocable is not supported by consideration, as understood in the law of contract, and hence the appellant herein is not bound to keep his offer open till acceptance and was entitled to revoke the same before acceptance on the part of the Corporation. As I have held already th-t the appellant had revoked the offer before its acceptance, he cannot be mulcted with any damages on account of any short fall in the re-auction conducted by the Corporation. On the other hand, he is entitled to the refund of the bid deposit made by him.

19. Under these circumstances, the appeal is allowed, and the judgment and decree of the trial Court are set aside, and the suit instituted by the respondent Corporation will stand dismissed, and the appellant will be entitled to the refund of Rs. 1,000 with interest at 6 per cent per annum from 19th March, 1968 till date of payment. Having regard to the peculiar circumstances of the case, the parties will bear their respective costs here as well as in the trial Court.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

V.O.C. Industrial Workers Co-operative Housing Society and others .. *Appellants**

v.

M. Karuppuswami .. *Respondent.*

Arbitration Act (X of 1940), section 34—Suit for accounts—Application under section 34 for stay of suit by the defendants—Stay granted by trial Court—Failure of defendants to pursue arbitration proceedings—Trial of suit taken up after giving defendants time for filing written statement—Objections by defendants that stay had not been vacated—Objections overruled—Decree passed—Scope of Court's powers under section 34—Discretion of trial Court—In case of no procedure laid down by statute Courts to eschew procedural technicalities and render justice—Court granting stay can discharge the same without any application before it.

The power of the Court under section 34 of the Arbitration Act, to grant stay of suit must necessarily include, by implication the power to modify, vary rescind or set aside the order of stay. It could not be the intention behind

*S.A. No. 259 of 1974. *2nd August,* 1977.

the section that a stay, once granted, could not thereafter be set aside. The position of the Court as a trier of the suit is such that an irrevocable order of stay would stultify its own jurisdiction. The Court under section 34 never completely puts it out of its power to direct the course which the suit should take at any given moment of time. The stay of suit under section 34 is for a special purpose, to wit, to enable the parties to go to arbitration. Once the fulfilment of that purpose is found to have become impossible, the very basis for the continuance of the stay also disappears. In such situation, the trial Court not only may proceed with the suit, it is its duty to do so. [*Para.* 4.]

It is well-settled that what the Court is called upon to do under section 34 of the Arbitration Act is to exercise a discretion one way or the other. When an application is made before it for stay of the suit for ensuring the arbitration to be taken up, the Court is by no means under a duty to stay a suit even in cases where all the requirements of the section are fulfilled. This being so, to contend that the Court could terminate the stay and resume the hearing of the suit only on being so moved by means of a formal application is not to read a procedural technicality which is not found in the statute, but to mistake the nature and purpose of the whole machinery of stay under the section. When once it is found that the Court's power to take up the hearing of the suit is always there, there is no scope at all for putting the Court under a straitjacket of procedure, especially where there is no express provision prescribing that procedure. [*Para.* 6.]

Cases referred to :—

Laxman v. *Manjunatha*, A.I.R. 1921 Bom. 458; *Bawa Chattagir* v. *Natanomal*, (1909) 4 S.C. 359; *Krishinchand* v. *Ramchand*, A.I.R. 1937 Sind. 247; *Bhasimukhi* v. *Parbati Sunkar*, A.I.R. 1919 Cal. 295; *Kruger Townswear Ltd.* v. *Northern Assurance Co. Ltd.*, (1935) 1 W.L.R. 1049.

Appeal against the decree of the Sub-Court of Coimbatore in A.S. No. 143 of 1973 preferred against O.S. No. 450 of 1965 District Munsif Court of Coimbatore.

G. M. Nathan and *N. Vanchinathan*, for Appellants.

K. Chandramouli and *V. V. Lakshminarayanan*, for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal relates to a suit stayed by the trial Court under section 34 of the Arbitration Act. The stay of suit was granted to enable the parties to go to the arbitrator for resolving the dispute which was the subject-matter of the suit. The arbitration, however, became infructuous. The second appeal raises the question as to how the trial Court should have proceeded in the circumstances stated above.

2. The suit in this case was filed in the District Munsif Court, Coimbatore, by a building contractor against a co-operative building society and two of its principal office-bearers. The suit was for accounts. The defendants entered appearance in the suit, but did not file any written statement. They moved the Court, instead, for an order staying the suit under section 34 of the Arbitration Act. They invoked the arbitration clause in the suit contract. The learned District Munsif granted the application of the defendants and stayed the suit. That was on 18th March, 1966. For a long time thereafter, however, nothing happened in the arbitration. The defendants did not take any initiative in the matter. In fact, contrary to what was said before the learned District Munsif in the application for stay, the Society was neither ready nor willing to refer the matter to arbitration and get on with it. On the contrary, they thwarted the attempts of the plaintiff, in that direction. For instance, the plaintiff, on his own initiative, moved the arbitrator to take up the arbitration. The arbitrator was the Deputy Registrar of Co-operative Societies, Coimbatore. Before the Deputy Registrar, the Society raised all kinds of technicalities. It was contended that the Deputy Registrar had no power to enter into the arbitration under section 73

of the Tamil Nadu Co-operative Societies Act. The defendants also pleaded before the Deputy Registrar that the plaintiff's motion for arbitration was barred by limitation. These objections brought the arbitration under a stalemate. After adjourning the matter several times, the Deputy Registrar ultimately declined to take up the arbitration.

3. Meanwhile, seeing that nothing served in the arbitration, the learned District Munsif, set down the suit for hearing, but not before granting the defendant-society time for filing their written statement. The defendants, however, excused themselves from filing their written statement on the technical ground that the earlier order of the Court granting stay of suit must first be formally set aside on an application moved specifically for that purpose before the Court. The learned District Munsif, however, declined to follow the procedure suggested by the defendants. And, in the absence of any written statement filed, he proceeded with the trial of the suit and ultimately passed a preliminary decree for accounts as prayed for by the plaintiff. This preliminary decree was confirmed in appeal by the learned Subordinate Judge, Coimbatore.

4. In the present second appeal, the defendants question the correctness of the procedure adopted by the learned District Munsif in proceeding with the trial of the suit without formally setting aside the earlier order of stay passed under section 34 of the Arbitration Act. Mr. Vanchinathan, appearing for the appellants, did not seriously contend that the trial Court had no jurisdiction at all to get on with the trial of the suit when it became clear to it that the arbitration, for the purpose of which the suit had been earlier stayed, had become infructuous. All the same, I think it necessary to consider the legal position. For, this has a bearing on the other contention raised by the learned counsel regarding procedure. Section 34 of the Arbitration Act expressly gives a discretion to the Court to grant stay of trial of a suit on its file to enable the parties to go to arbitration. Where the Court exercises the discretion in favour of the defendant, the Court passes an order staying the suit. But, once that happens, there is no express provision in section 34 or elsewhere in the Act enabling the Court to cancel or set aside the order of stay at a subsequent point of time. Nonetheless, the position would seem to be one of construction of the scope of the Court's jurisdiction. The power of the Court under section 34 to grant stay of suit must, in my opinion, necessarily include by implication, the power to modify, vary, rescind or set aside the order of stay It cannot be the intention behind the section that a stay, once granted, cannot thereafter be set aside. The position of the Court as a trier of the suit is such that an irrevocable order of stay would stultify its own jurisdiction. The Court under section 34, never completely puts it out of its power to direct the course which the suit should take at any given moment of time. The very conception of stay of suit in the context of the powers of the trial Court excludes any idea of a permanent tying down by the Court of its own hands. There is yet another consideration which has relevance to cases of this kind. The stay of suit under section 34 is for a special purpose, to wit, to enable the parties to go to arbitration. Once the fulfilment of that purpose is found to have become impossible, the very basis for the continuance of the stay also disappears. In such situation, the trial Court not only may proceed with the suit; it is its duty to do so.

5. The position in law would seem to have been the same under the law relating to arbitration before the Arbitration Act of 1940 was enacted. Cases had arisen before Courts in India in regard to stay of suits under paragraph 18 of the Second Schedule to the Civil Procedure Code. It has been held that if arbitration becomes impossible for any reason, the Court ought to proceed to decide the suit itself. It has also been held that the stay order may be discharged if the parties are unable to obtain a satisfactory arbitrator or to bring the arbitration proceedings to a satisfactory and speedy conclusion—See *Laxman* v.

Manjunatha[1], *Bawa Chattagir* v. *Natanmal*[2], *Kishinchand* v. *Ramchand*[3], and *Bhasimukhi* v. *Parbati Sunkar*[4]. The power to discharge a stay order and to get on with the suit sometimes traced in some decisions to the inherent powers of the Court is saved by section 151, Civil Procedure Code. In England also the procedure is available whereby the parties to an arbitration agreement who had once obtained an order of stay of the suit between them from the Court may move the same Court for getting the stay vacated on finding that the arbitration has not borne fruit. See *Kruger Townswear Ltd.* v. *Northern Assurance Co., Ltd.*[5]. It therefore, seems to be that the Court does have jurisdiction to discharge an order of stay made by it earlier under section 34 of the Arbitration Act.

6. Mr. Vanchinathan concentrated his argument not so much on the jurisdictional aspect, but on the procedural one. He said that the procedure followed by the District Munsif in this case was not proper. It has already been noticed that no application was before the District Munsif in and by which he was invited to set aside the earlier order of stay. This, according to learned counsel, was a caution that the Court should have left the stay untouched. He pointed out that when section 34 contemplated an application to be moved by the defendants for stay of suit, it was meet and proper that the same procedure should be adopted by the trial Court for later setting aside the stay and resuming the hearing of the suit. I do not, however, accept this argument as sound. It is well-settled that what the Court is called upon to do under section 34 of the Arbitration Act is to exercise a discretion one way or the other, when an application is made before it for stay of the suit for ensuring the arbitration to be taken up. The Court is by no means under a duty to stay a suit even in cases where all the requirements of the section are fulfilled. This being so, to contend that the Court could terminate the stay and resume the hearing of the suit only on being so moved by means of a formal application is not only to read a procedural technicality which is not found in the statute, but to mistake the nature and purpose of the whole machinery of stay under the section. When once it is found that the Court's power to take up the hearing of the suit is always there, as I have shown above on a construction of the section, there is no scope at all for putting the Court under a strait-jacket of procedure, especially where there is no express provision prescribing that procedure. The prime need of our Court system at the present moment is to reduce, as far as possible, the technicalities and refinements of procedure. This may not be possible of achievement in matters where the code or other relevant law lays down the procedure, in black and white. But, where the codes are silent, there is, in my view, every reason for the Courts to eschew procedural technicalities and get on with the job on hand. I, therefore, feel that the learned District Munsif acted quite sensibly in cutting the cackle of procedure and straightaway proceeding with the trial of the suit. The defendants cannot complain of this course, considering that they were given ample opportunity of filing their written statement. This opportunity was deliberately refused to be availed of by the defendants. They cannot now seek to unsettle every thing that subsequently happened at the trial merely on the flimsy thread of technicality pleaded by them, which, as I have shown above, wilts under examination.

7. In *Kisinchand* v. *Ramchand*[1], it was held that where a Court had stayed a suit under paragraph 18 of Schedule 2 of the Civil Procedure Code, ordinarily speaking, the Court should first remove the stay before it revives the suit and then decide the suit on its merits. The learned Judges, however, added that if the Court does not write a separate order vacating the original order of stay, but proceeds to hear the suit, the order of stay must be deemed to have been vacated by implication. The same

1. A.I.R. 1921 Bom. 458.
2. (1909) 4 I.C. 359, 361.
3. A.I.R. 1937 Sind 247.
4. A.I.R. 1919 Cal. 295.
5. (1953) 1 W.L.R. 1049.

1. A.I.R. 1937 Sind 247.

Court on an earlier occasion in *Bawa Chattagir* v. *Natanomal*[1], put the matter in proper perspective in the following passage—

> "The Act (Arbitration Act, 1899) contemplates a business-like procedure on the part of those desiring to refer, and the whole object of the Legislature will be frustrated if it is to be utilised as a means of prolonging litigation indefinitely.... I construe the order staying proceedings for such reasonable time as would enable the defendants to get an arbitration carried through....Defendants have already had an excessive time, and I consider that they have shown themselves to be not ready and willing to do all things necessary for the conduct of the arbitration. Having regard to the obstinate attitude adopted by the Bawa towards arbitration, I believe that the difficulty of obtaining a satisfactory arbitrator, and of bringing the arbitration proceedings to a satisfactory and speedy conclusion would be almost impossible."

The position, in my view, is the same under the present Arbitration Act of 1940. The Court which granted the stay has every power to discharge the same either on the ground that the arbitration has become infructuous or on the ground that the parties are not intent upon getting their disputes properly decided in arbitration.

8. Mr. Vanchinathan, in conclusion, pleaded that another chance might be given to the parties to pursue the arbitration proceedings, I do not think that this request, coming as it does from the defendants, deserves consideration. It is on record that the Society had opposed the plaintiff tooth and nail when the plaintiff moved the Deputy Registrar of Co-operative Societies to get on with the arbitration and raised all sorts of objections to his entertaining the arbitration. This resulted in a stalemate, because, the Deputy Registrar declined to act although he was the arbitrator named in the arbitration agreement and there was no provision for a substitute. In any case, there has been an unconscionable delay—a matter of nearly 11 years—since the time when the District Munsif granted the order of stay. Since then, not only had the learned District Munsif passed the preliminary decree which has been confirmed by the learned Subordinate Judge and has come up on this appeal, but I learn from the Bar that a final decree has also been passed in the suit. In the circumstances, I must give a quietus to the whole matter, which I do by dismissing the second appeal. But I do so, in the circumstances, without costs.

S.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*Suryamurthy, J.*

K. Mohideen Ibrahim .. *Appellant**

v.

M. Muhammed Abdullah .. *Respondent.*

Easement—Suit for declaration of easement rights—Common wall—Co-owners—Co-owner cannot claim easement right in respect of common wall.

A person cannot acquire an easement unless he acts with the knowledge that it is case of dominant and servient tenement and he is exercising a right over property which does not belong to him. If he enjoys a right under the supposition that he is the owner of the property he does not acquire an easement. A person cannot also acquire an easement of light and air over property jointly owned by him with others.

[*Para.* 6.]

A right whith cannot be prevented from being exercised by physical interference during the period of enjoyment cannot be acquired as an easement. Before time can commence to run under the Easement Act, there must be an invasion of some legal right. Acts which are neither preventible nor actionable cannot be relied upon to found an easement.

1. (1909) 4 I.C. 359, 361.

*S.A. No. 21 of 1976. 21st *July*, 1977.

In the case of a common wall each co-owner is entitled to a reasonable user of the wall owned in common, and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes, and the other co-owners will have no cause for complaint unless the acts alleged amount to his ouster or to the destruction of the party wall. The opening of an aperture in the common wall by a co-owner should, therefore, be treated as incidental to the enjoyment of the common property, and it does not amount to trespass upon the right of the other co-owner which would entitle him to prevent such trespass by physical obstruction or by an action in a Court of law When there is no scope for such an action, a co-owner cannot be deemed to have acquired a right of easement by prescription to ancient light and air through those apertures. [*Para.* 7.]

Cases referred to :

Raju Bai Mohambai v. *Lal Bai Mulchand,* A.I.R. 1926 Bom. 545 (1); *Imambandi* v. *Rahimbai,* I.L.R. 49 Bom. 586 : A.I.R. 1925 Bom. 378; *Konda* v. *Ramaswami* (1915) I.L.R. 38 Mad. 1 : 6 L.W 564; *Venkata Varaha Dikshitar* v. *Subbaraya Pillai,* (1911) M.W.N. 95 : 20 M.L.J. 306; *Attorney-General of Southern Nigeria* v. *John Holt & Co., Liverpool Ltd.,* (1915) A.C. 599; *Subba Rao* v. *Lakshman Rao,* I.L.R. 49 Mad. 820 : 23 L.W. 609: A.I.R.1926 Mad. 728 (F.B.); *Iyall* v. *Lord Northfield,* (1914) 3 K.B. 911; *Narayan Balwant* v. *Shankar Waman,* A.I.R. 1938 Bom. 215; *Nageswara Rao* v. *Ramachandra Rao,* (1972) 2 A.P.L.J. 397: (1973) 2 An.W.R. 36 : (1973) 1 An.L.T. 128: A.I.R. 1973 A.P. 86.

Appeal against the decree of the District Court. Ramanathapuram at Madurai in A.S. No. 121 of 1975, preferred against O.S. No. 75 of 1973, Sub-Court, Ramanathapuram, Madurai.

R. Nadanasabapathy and *M. Liaqat Ali,* for Appellant.

E. Padmanabhan and *Kanniah,* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff from the judgment and decree of the learned District Judge, Ramanathapuram at Madurai dismissing A.S. No. 121 of 1975 on the file of his Court and confirming the judgment of the learned Subordinate Judge, Ramanathapuram at Madurai, dismissing O.S. No. 75 of 1973, a suit instituted by the plaintiff for declaration that the suit wall marked AB in the sketch annexed to the plaint is the exclusive wall of the plaintiff, for declaration that the plaintiff is entitled to right of easement for free flow of light and air through the windows marked W-3 to W-7 in the aforesaid sketch, for a permanent injunction restraining the defendant and his men from interfering in any way with the plaintiff's right to light and air through the said windows and for a mandatory injunction directing the defendant to remove the terraced portion of the building immediately west of the windows W-1 and W-2 and the constructions put up by him west of the windows W-3 and W-4.

2. The house bearing door No. 97 in Periapallivasal St.. Virudhunagar originally belonged to Kader Mohideen Rowther, father of the plaintiff. The father of the plaintiff inherited a portion of the said property from his father and purchased the remaining portion under a registered sale deed dated, 22nd October, 1910. The old constructions were demolished and new constructions were put up in the year 1911 or 1912. According to the plaintiff, it was his father who constructed the western wall as well as the eastern wall for the building bearing door No. 97. At the time of the construction of the walls, the plaintiff's father put up five windows on the groundfloor marked as W-1 to W-5 in the plaint sketch and two windows in the upstairs portion marked as W-6 and W-7. The said windows are ancient windows through which the house was getting light and air from the open space on the western side. The plaintiff's contention is that the western wall of the said door No. 97, which is the subject-matter of the suit, is his exclusive wall and that he has acquired

an easementary right for his house through the windows W-1 to W-7.

3. The western house bearing door No. 96 originally belonged to one Ismail Rowther, son of Hussain Rowther. According to the plaintiff, originally there was a construction only on the southern portion of the said house and the remaining portion was a vacant site, and the owner of that building had absolutely no right whatsoever to the western wall of door No. 97. One Arunachala Nadar purchased the eastern half of door No. 96 from one Abdul Kader Rowther in the year 1958. He removed the terraced portion that was then in existence and which was below the level of the windows W-1 and W-2 in the suit wall and put up a new construction in 1959 at a higher level, thereby obstructing the two windows. He also put up a tiled verandah adjoining the suit wall and sloping towards south. That construction also, according to the plaintiff, obstructed a portion of window No. 4 in the suit wall. The plaintiff contends that as he was at Madurai at the time of the said construction, he was not aware of them and as soon as he came to know about the constructions, he issued a notice on 21st October, 1959, to Arunachala Nadar calling upon him to remove the offending constructions. There was talk of compromise and Arunachala Nadar agreed to remove the offending portions in order to facilitate the free flow of the light and air to the house of the plaintiff through the windows W-1, W-2 and W-4 and removed the tiled construction adjoining the window W-4. However, he did not remove the construction which was causing obstruction to the other two windows. Subsequently, the defendant purchased door No. 96 from Arunachala Nadar under a registered sale deed, dated 22nd January, 1973. In that document, the suit wall is described as a common wall. The contention of the plaintiff is that this recital is false and has been introduced deliberately for the purpose of putting forward a false claim to the suit wall. The defendant applied to the Virudhunagar Municipality for reconstruction of his building. He filed a plan showing the suit wall as a common wall. The plaintiff sent a petition to the Commissioner of Virudhunagar Municipality objecting to the issue of permission to the defendant for putting up constructions in such a manner as to affect his right to the suit wall and also his easementary right of light and air through the windows in the suit wall. He also gave a complaint to the police on 19th April, 1973. The police made an enquiry. According to the plaintiff, he and the defendant gave an undertaking to the police not to put up any new construction without settling their disputes either with the aid of mediators or through a competent Court. Overruling the objections raised by the plaintiff, the Commissioner of Virudhunagar Municipality granted permission to the defendant to put up constructions. In pursuance of that permission, the defendant started digging up the grounds to lay the foundation of his building close to the suit wall. The plaintiff once again sought the help of the police. On 23rd May, 1973, the plaintiff received a copy of the order, dated 21st March, 1973, passed by the Commissioner of the Municipality granting permission to the defendant to put up constructions. He directed the plaintiff to seek his remedy in a civil Court. According to the plaintiff, he rushed to Madurai immediately to take necessary legal action against the defendant, and taking advantage of his absence from Virudhunagar, the defendant removed the tiled roof adjoining the fourth window from the south and raised the east-west (*sic*) window in between the windows W-3 and W-4 to such a height as to obstruct the said windows. He also laid rafters from north to south in order to put up a terrace over them. The contention of the plaintiff is that if the defendant is permitted to construct a building, the passage of light and air through the windows W-3 and W-4 would be completely cut off and his building will become unfit for occupation.

4. The contention of the defendant is that the wall is a common wall, that both the buildings have been in existence even from prior to 1900, that in a Will dated 17th July, 1934 in respect of door No. 96 and some other properties,

which was attested by the father of the plaintiff, the suit wall has been described as a common wall, that all the windows in the disputed wall had been closed even during the lifetime of the plaintiff's grandfather, that Arunachala Nadar remodelled the then existing building and that the claim of the plaintiff for easementary right of light and air is untenable and has been put forward merely to harass the defendant who has purchased the building despite the attempt of the plaintiff to purchase the same.

5. It has been found by the Courts below that the suit wall is a common wall and that the plaintiff is not exclusively entitled to the wall. This finding is based on evidence, oral and documentary, adduced by both sides. This finding of the Courts below is correct. The trial Court has further found that by reason of the construction put up by the defendant, the windows W-1 and W-2 in the southernmost portion of the suit wall had been closed even in the year 1958 when door No. 96 belonged to Arunachala Nadar and that even according to the plaintiff there is no obstruction to the passing of light and air through the window W-5 or the windows W-6 and W-7. It has been further found by the learned Subordinate Judge that even according to the plaintiff there is no offending construction blocking W-3 and W-4. These findings of fact have been concurred in by the learned District Judge. Therefore, on facts, the plaintiff is not entitled to the injunction prayed for. The plaintiff has not established that there was such a substantial deprivation of light and air to his house as to render the occupation of his house uncomfortable, according to the ordinary notions of mankind and as beneficially as before.

6. The question to be considered is whether the plaintiff is entitled to the injunction prayed for in view of the fact that the windows, through which he claims easementary right, are situate in the common wall belonging to the plaintiff and the defendant. This question was considered by a Bench of the Bombay High Court in *Raju Bai Mohambai* v. *Lal Bai Mulchand*[1], and it was held that:

> "There can be no question of easement as regards light and air in the case of joint property. Both parties were entitled to the full ownership of this wall, and the plaintiff after the fire in 1884, repaired the party wall with the consent and acquiescence of the defendants. Then the result would be as was decided in *Imambandi* v. *Rahimbai*[2], that where one of two neighbouring owners raises a party wall, the other owner either giving his consent or acquiescing, the raised portion of the wall assumes the same character as the old party wall on which it stands. If the plaintiff opened apertures in the wall he could not acquire an easement of light and air through these windows over the defendants' premises. It would be open to the defendants to object to the windows being opened, and even if they did not file a suit that would not prevent them from blocking the windows opened by the plaintiff so as to look over the defendant'spremises.
>
> The plaintiff therefore was not entitled to the injunction sought for in the plaint........."

In *Konda* v. *Ramaswami*[3], Sundara Ayyar and Sadasiva Ayyar, JJ., held that :—

> " there is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription."

Similarly in *Venkata Varaha Dikshitar* v. *Subbaraya Pillai*[4], it was held that a "false belief of ownership does not necessarily preclude the acquisition of a right of easement". However, in *Attorney General of*

1. A.I.R. 1926 Bom. 545 (1).
2. I.L.R. 49 Bom. 586: A.I.R. 1925 Bom. 378.
3. (1915) I.L.R. 38 Mad 1 : 6 L.W. 564.
4. (1911) 1 M.W.N. 95 : 20 M.L.J. 306,

Southern Nigeria v. *John Holt and Co., Liverpool Ltd.*[1], the Privy Council held that—

> "An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built, up or asserted is the right over the property of that other...."

Therefore, the learned Judges of the Bench of this Court, who heard an appeal in the first instance in the case reported in *Subba Rao* v. *Lakshman Rao*[2], thought that the judgment of this Court referred to earlier may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easement Act but on the English law. Odgers, J., who was one of the two Judges who made the reference, was of the opinion "that the ruling in *Konda* v. *Ramaswami*[3], with great deference to the opinion of the two eminent Judges who decided it, is wrong and that if a man exercises a right with the animus or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription". In answering the reference, the Full Bench held that—

> "The learned Judges in *Konda* v *Ramaswami*[3], seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against the right of easement, yet the question *quo animo agenit*—to what purported character are the acts of user to be ascribed, is one which the Court must answer, and if *Konda*, v. *Ramaswami*[3], implied the contrary we think it is wrongly decided. We agree with the conclusion of Shearman, J., in *Iyall* v. *Lord Northfield*[4], that acts done during the statutory periods which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact...."

1. (1915) A.C. 599, 618.
2. 23 L.W. 609: I.L.R. 49 Mad. 820: A.I.R. 1926 Mad. 778 (F.B.)
3. (1915) I.L.R. 38 Mad. 1 : 6 L.W. 564.
4. (1914) 3 K.B. 911.

Therefore, a person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and he is exercising a right over property which does not belong to him. If he enjoys a right under the supposition that he is the owner of the property he does not acquire an easement. He cannot also acquire an easement of light and air over property jointly owned by him with others. A Bench of the Bombay High Court in *Narayan Balwant* v. *Shankar Waman*[1], has held that "it is not possible for a person to acquire an easement of light and air through a window in a joint wall belonging to himself as well as to the owner of the other premises."

7. The ratio behind these decisions is that when one of the owners of a common wall opens windows in that common wall, he does so in exercise of his rights as a co-owner and, therefore, cannot acquire a right of easement in respect of the windows against the co-owner. A right which cannot be prevented from being exercised by physical interference during the period of enjoyment cannot be acquired as an easement. Before time can commence to run under the Easement Act, there must be an invasion of some legal right. Acts which are neither preventible nor actionable cannot be relied upon to found an easement. In the case of a common wall, each co-owner is entitled to a reasonable user of the wall owned in common, and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes, and the other co-owners will have no cause for complaint unless the acts alleged amount to his ouster or to the destruction of the party wall. The opening of the apertures in the common wall by the plaintiff should therefore, be treated as incidental to the enjoyment of

1. A.I.R. 1938 Bom. 215.

the common property, and it does not amount to trespass upon the right of the other co-owner which would entitle him to prevent such trespass by physical obstruction or by an action in a Court of law. When there is no scope for such an action, the plaintiff cannot be deemed to have acquired a right of easement by prescription to ancient light and air through those apertures.

8. In *Nageswara Rao* v. *Ramachandra Rao*[1] a Bench of the Andhra High Court has held that the co-owner of a joint wall could not acquire an easement in respect of light and air through the windows in the joint wall whatever may be the period of his enjoyment prior to the date of the suit, as the normal method of enjoyment of joint wall also includes the enjoyment by opening windows or ventilators which could not give rise to any trespass so as to give a cause of action for an obstruction or a suit in a Civil Court to prevent it at the instance of the other owner. I follow this view of the Bench of the Andhra Pradesh High Court. Therefore, the plaintiff is not entitled to claim an easementary right by prescription to ancient light and air through the seven windows in the common wall. Hence the judgments and decrees of the Courts below are confirmed, and this second appeal is dismissed with costs.

S.J. ——— *Appeal dismissed.*

1. (1972) 2 A.P.L.J 397 : (1973) 2 An.W.R. 36 : (1973) 1 An.L.T. 128: A.I.R. 1973 Andh. Pra. 86.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*N.S. Ramaswami, J.*

Chellammal .. *Appellant**

v.

Valliammal .. *Respondent.*

Hindu Law—Co-widows—Partition by metes and bounds of properties left by husband—Validity—Co-widow's power to effect final and absolute partition even before the Hindu Women's Rights to Property Act—"Acquired by female Hindu at a partition" ......in section 14 (1) *of Act* (*XXX of* 1956)*—Meaning of—Lease of land by one co-widow after partition—Other co-widow executing a gift deed in respect of the land leased in favour of tenant—Would amount to tenant setting up title against the landlady and would forfeit the lease—Hindu Succession Act* (*XXX of* 1956)*—Transfer of Property Act* (*IV of* 1882)*, section* 111 (g).

K died on 18th September, 1942 leaving behind his two wives *C* and *V*. *K* also left behind properties including agricultural lands. The two widows in 1943 effected a final partition of the properties by metes and bounds. In respect of one of the suit properties which fell to *V*'s share in partition, *V* leased it to *X* who was a nephew of the deceased *K*. *C*, the other widow executed a settlement deed purporting to gift to the second defendant *X*, an undivided half share of the properties left by her late husband. Thereafter *X* disputed the title of *V* to the suit properties leased to him. *V* filed the suit fo declaration and possession. The defendants *C* and *X* contended that the widows had no right to effect a final partition. The suit was decreed. The defendants *C* and *X* who failed in the lower appellate Court filed a second appeal.

Held: Even before the Hindu Women's Rights to Property Act was made applicable to agricultural lands, under the textual Hindu Law there could be a final and absolute partition between co-widows by mutual consent. [*Paras.* 9 *and* 13.]

Even under the Hindu Law co-widows can put an end to the right of survivor-

*S.A. No. 1833 of 1974. 22*nd August*, 1977.

ship and in case there had been a final and absolute partition by metes and bounds between them there would be no further right of survivorship between the two. [*Para.* 10.]

Under the Hindu Women's Rights to Property Act, 1937, on the death of her husband, a widow gets the same share as the son. That means she would be entitled to enforce a final and absolute partition even though the co-widows or any other sharer may not contend for such a partition. [*Para.* 11.]

The words ' acquired by a female Hindu.. at a partition' in the *Explanation* to section 14 (1) of the Hindu Succession Act would not refer to properties given to a female Hindu (even though it might be under a partition deed) in lieu of maintenance or arrears of maintenance since the *Explanation* refers to acquisition of properties in lieu of maintenance or arrears of maintenance as distinct from properties acquired at a partition. Hence the words " acquired by a female Hindu.. at a partition" cannot mean that she should not have had any pre-existing right in the property. [*Para.* 15.]

It is true that 'possession' contemplated in section 14 (1) need not necessarily be physical possession but it would include constructive possession also. [*Para.* 17.]

The plaintiff by virtue of the partition was in exclusive possession of the suit properties and the right of survivorship, even assuming that it continued, came to an end when the Hindu Succession Act came into force and the first defendant(*C*) was neither in physical nor constructive possession of the suit properties nor had she any right to possession because of the partition of the year 1943 and therefore only the plaintiff's right to the suit properties enlarged into an absolute estate by virtue of section 14 (1). [*Para.* 18.]

It was to be noted that within five months of the execution of the lease deed in favour of the plaintiff, the second defendant (*X*) obtained a gift deed from the first defendant (*C*) in respect of all the properties inclusive of the properties which he took on lease. The very taking of the gift from the first defendant, would go to show that he set up title in the first defendant and in himself. Undoubtedly he was setting up a hostile title and therefore the finding that he had forfeited the lease was right. [*Para.* 19.]

Cases referred to: —

Karpogathachi v. *Nagarathinathachi*, (1965) 2 An.W.R. (S.C.) 61 : (1965) 2 S.C.J. 445 : (1965) 2 M.L.J. (S.C.) 61 : A.I.R. 1965 S.C. 1752; *Munnalal* v. *Rajkumar*, A.I.R. 1962 S.C. 1493 ; *Sampathkumari* v. *Lakshmiammal*, I.L.R. (1962) Mad. 832 : 75 L.W. 639 : (1962) 2 M.L.J. 464: A.I.R. 1963 Mad. 50 ; *Nagama Naicker* v. *Ponnuchinnayan*, (1970) 1 M.L.J. 437; *Mohamed Amir* v. *Municipal Board*, *Sitapur*, (1966) 1 S.C.J. 484: A.I.R. 1965 S.C. 1923 .

Appeal against the decree of the District Judge, Coimbatore, in A.S. No. 129 of 1972.

T.R. Ramachandran and *T.R. Rajagopalan*, for Appellant.

S. Nainarsundaram, *V. Natarajan* and *V. Nicholas*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants. The appeal arises out of a suit for declaration of title in respect of the suit properties, for permanent injunction in respect of one item and for recovery of possession and other reliefs in respect of another.

2. The plaintiff and the first defendant are the widows of one Kandaswami Gounder who died on 18th September, 1942. He had no issue. He left considerable immovable properties in the shape of agricultural lands. The case of the plaintiff has been that even in the year 1943 there had been a final partition of the properties by metes and bounds between the two widows by mutual consent, that in the said partition the suit properties fell to her (plaintiff's) share, that in respect of one of the suit properties (item 2 of first schedule) the second defendant who is no other than Kandaswami Gounder's brother's son became a tenant under the plaintiff and that as the second defendant failed to pay the rent and began disputing her title along with the first defendant, the suit was necessitated. It is under Exhibit A-1 dated 12th February 1964, the second defendant became

lessee of one of the suit properties under the plaintiff, but within five months thereafter, that is, under Exhibit A-5, dated 13th July, 1964, the first defendant purported to gift to the second defendant an undivided half share in the properties left by her late husband, Kandaswami Gounder. The second defendant, by virtue of the above settlement deed disputed his lessor's (plaintiff's) title contending that he had become the owner of an undivided half share in the suit properties. Only thereafter the suit out of which this second appeal arises came to be filed.

3. As I said, the case of the plaintiff has been that there had been a final partition by metes and bounds by mutual consent between her and the first defendant even in the year 1943 and that in the said partition, the suit properties fell to her share. It is her further case, that by virtue of the Hindu Succession Act, 1956, she became the absolute owner of the properties including the suit properties which fell to her share in the above said partition.

4. The defendants *inter alia* contended that there was no final partition as claimed by the plaintiff, that the division of the properties was only for the purpose of convenient enjoyment and not a final and absolute partition and that therefore there is no question of the plaintiff getting a declaration of title in respect of the suit properties.

5. The trial Judge gave a halting finding regarding the question of partition. He found that the partition as claimed by the plaintiff was not true but still there was a partition arrangement under which she became entitled to the properties in question. Therefore, the learned Judge held that the settlement deed, purporting to gift an undivided half share of the properties executed by the first defendant in favour of the second defendant, is not valid in respect of the properties in question, that the plaintiff is entitled to an injunction in respect of item 1 and recovery of possession of item 2 of the plaint first schedule properties and that she is also entitled to arrears of mesne profits at a particular sum in respect of item 2. The future mesne profits regarding this item was directed to be determined in separate application. He awarded costs to the plaintiff, but limited it to a certain sum.

6. The defendants filed an appeal to the District Judge of Coimbatore against the decree and judgment of the trial Court. The plaintiff filed a memorandum of cross-objections claiming that the trial Court ought to have awarded past mesne profits at a higher rate and it was also not right in restricting the quantum of costs.

7. The first appellate Court, on a review of the entire evidence, has given a finding that the partition of the year 1943 between the plaintiff and the first defendant was a final and absolute partition by metes and bounds of the properties left by Kandaswamy Gounder and that therefore, the plaintiff was entitled to the relief of declaration of title in respect of the suit properties as well as for injunction in respect of item 1 and for possession in respect of item 2 of the plaint first schedule properties. It had been contended before the first appellate Court that the second defendant was in any event entitled to the benefits of the Cultivating Tenants Protection Act and that therefore he cannot be evicted from item 2. This contention has also been negatived by the first appellate Court an the decree for possession granted by the trial Court was confirmed. The appellate Judge further held that the plaintiff was not entitled to any amount more than the amount awarded by the trial Court regarding arrears of mesne profits, but the trial Court was not right in restricting the costs. Only regarding the question of costs, the momorandum of cross-objections was allowed. The appeal filed by the defendants was dismissed with costs.

8. In this second appeal by the defendants, the contention of Mr. T. R. Ramachandran, learned counsel for the appellants, is that in 1943, there could not in law be a final and absolute partition between the two widows, that then they had only a widow's estate in all the properties left by their late husband, Kandaswami Gounder, that they could divide only the usufructs from the properties and for the purposes

of convenience, they were in separate possession of the properties, that the right of survivorship between the two widows continued and that on the coming into force of the Hindu Succession Act, 1956, both the widows became absolute owners of the entire estate left by Kandaswami Gounder. It is his contention that only after the coming into force of the Hindu Succession Act, the question of a final partition by metes and bounds between the two widows would arise and that therefore the plaintiff's suit for a declaration of title in respect of the suit properties on the ground that they had been allotted to her in the partition of the year 1943 is not well-founded. In respect of item No. 2 which is in the possession of the second defendant as a lessee, the further contention is that even if the defendants fail on the first point, the plaintiff would not be entitled to recovery of possession of item No. 2. The contention is that the second defendant has not forfeited the lease on the ground of denial of title as contended by the plaintiff and that therefore, as a lessee, he would be entitled to protection under the Cultivating Tenants Protection Act and not liable to be evicted.

9. I am unable to accept any of these contentions. The main contention is about the plaintiff's title to the suit properties. It is to be noted that the present contention of the learned counsel, as referred to earlier, is raised for the first time only now. There is admittedly no pleading, nor was it raised in the Court below. What is more, it had not been raised even in the grounds of second appeal. Even so, the question being one of law, the learned counsel was allowed to put forth his arguments on the question. The contention, as already seen, is that in law there cannot be a final and absolute partition between two widows inasmuch as they had only a widow's estate and the joint title of the widows cannot be put an end to. Learned counsel referred to certain passages in Mayne's Hindu Law for the purpose of pressing his point that one of the two widows in this case had no right to demand a final and absolute partition. There can be no dispute that in 1943, when the Hindu Women's Rights to Property Act had not become applicable to agricultural lands, neither the plaintiff nor the first defendant in this case had a right to demand an absolute and final partition which would put an end to joint title to the estate. But what the learned counsel overlooked is that even before the Hindu Women's Rights to Property Act was made applicable to agricultural lands, there can be a final and absolute partition between the two widows by mutual consent.

10. In *Karpogathachi* v. *Nagarathinathachi*[1], it is pointed out that when two widows inherit their husband's properties, they take together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment and that one without the consent of the other cannot enforce an absolute partition of the estate so as to destroy the right of survivorship. However, it was recognised that there can be an absolute and final partition of the estate destroying the right of survivorship by mutual consent of the widows. In that case, on facts it was found that there had been no final and absolute partition and that the partition arrangement was only for the purpose of convenient enjoyment. But in the present case, as already seen, the finding of fact by the first appellate Court which cannot be challenged, and in fact rightly not challenged by Mr. T. R. Ramachandran, is that by consent of the two widows there had been a final and absolute partition by metes and bounds of the properties left by Kandaswami Gounder. In the face of such a finding, it is idle to contend that the right of survivorship continued even after the said partition of the year 1943. It must be remembered that even under the Hindu Law it is open to the co-widows to put an end to the right of survivorship and if there had really been a final and absolute partition by metes and bounds, as held by the first appellate Court, there can be no further right of survivorship between the two.

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1. (1965) 2 An.W.R. (S.C.) 61 : (1965) 2 S.C.J. 445 : (1965) 2 M.L.J. (S.C.) 61 : A.I.R. 1965 S.C. 1752.

11. Even the theory that one of the two co-widows is not entitled to demand a final and absolute partition so as to put an end to the right of survivorship had been given the go-by under the Hindu Women's Rights to Property Act, 1937. Under that Act, on the death of her husband, the widow gets the same share as the son. That means she would be entitled to enforce a final and absolute partition even though the co-widows or any other sharer may not consent for such a partition. In *Munnalal* v. *Rajkumar*[1], it is pointed out that the Legislature by enacting the Hindu Women's Rights to Property Act, 1937, made a significant departure from the textual law.

12. But it is pointed out on behalf of the defendants that in the present case Kandaswami Gounder having died in 1942 and the partition between the two widows being in 1943, when the Hindu Women's Rights to Property Act, 1937, had no application to agricultural lands, the change effected under that Act has no application to the present case. Per contra, it is contended on behalf of the plaintiff-respondent that after the 1937 Act was made applicable to agricultural lands (it was so made applicable in November, 1946 by Madras Act XXVI of 1947), one widow could have demanded a final and absolute partition so as to put an end to the right of survivorship and that the mere fact that there had already been a partition between the two could not make any difference.

13. But I think it is unnecessary to pursue this point because it cannot be disputed that even prior to the application of the 1937 Act, under the textual law, there can be a final and absolute partition so as to put an end to the right of survivorship by mutual consent of the widows. That is what has happened in this case. It is needless to stress that in this case the finding of fact by the first appellate Court is that by consent of the plaintiff and the first defendant, there had been a final and absolute partition of the properties left by Kandaswami Gounder.

1. A.I.R. 1962 S.C. 1493 at 1500.

14. Mr. T. R. Ramachandran, learned counsel for the appellants, contended that the plaintiff in this case cannot be said to have acquired the suit property under the partition of 1943, inasmuch as she along with the first defendant had inherited a widow's estate on the death of Kandaswami Gounder and that therefore it cannot be claimed by the plaintiff that by virtue of section 14 (1) of the Hindu Succession Act, she had become the absolute owner of the suit properties. In this connection, learned counsel referred to *Sampathkumari* v. *Lakshmiammal*[1]. There the question was whether section 14 (2) applied because of the recitals contained in the partition deed between the widows. At page 60, the Division Bench observed that the partition deed does not in any way restrict the ordinary Hindu widow's estate which each of the widows would otherwise have had in the properties on that date. It was further pointed out that the recitals in the partition deed merely stated what would otherwise have happened, namely, that the property would go to the heirs according to law, and that there was no clause whatever in the deed restricting the ordinary Hindu women's estate which the two widows would normally have. It was further pointed out that the widows did not 'acquire' the right to the property only under the partition deed, for the simple reason that they had acquired the right even previously by inheritance as widows of their husband and the partition merely divided the property by allotting some to one widow and the rest to the other widow. On behalf of the appellants herein the observations of the Division Bench that the word 'acquired' in section 14 (2) means that prior to the acquisition the widows should not have had any interest in the lands whatever is pressed.

15. It is settled law that if a partition deed or any other instrument only recog-

1. I.L.R. (1962) Mad. 832 : 75 L.W. 639: (1962) 2 M.L.J. 464 : A.I.R. 1963 Mad. 50.

nised a pre-existing right of the widow, it is not a case of the widow 'acquiring' the property as contemplated under that sub-section and that under such circumstances that sub-section would have no application. But when section 14 (1) speaks of a female Hindu acquiring property before or after the commencement of the Act, the question is whether the acquisition contemplated should necessarily be without any pre-existing right whatsoever. The *Explanation* to section 14 (1) defines the word "property" occurring in that sub-section as including both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance etc. The contention on behalf of the plaintiff-respondent is that in this case, in any event, there having been a partition (whether the widows were entitled to enter into a final and absolute partition or not) in the year 1943, it must be held that the plaintiff acquired the suit properties under the said partition as contemplated under section 14 (1) and as she is in possession, her widow's estate became an absolute estate. However, the contention on behalf of the appellants is that the plaintiff did not 'acquire' the suit properties under the partition inasmuch as she along with the first defendant had inherited a widow's estate in the properties on the death of their husband. But it should be remembered that the *Explanation* to section 14 (1) specifically refers to acquisition of properties under a partition. One can get a share under a partition only if he or she had some pre-existing right in the same. It is true that in a partition in a family, a woman may be allotted certain properties even though she had no pre-existing right to a share because of her right to maintenance or arrears of maintenance. But as already seen the *Explanation* to section 14 (1) specifically refers to property acquired in lieu of maintenance, for arrears of maintenance apart from property acquired at a partition. What I stress is that the words "acquired by a female Hindu........at a partition" would not refer to properties given to a female Hindu (even though it might be under a partition deed) in lieu of maintenance or arrears of maintenance, for the simple reason, the *Explanation* refers to acquisition of properties in lieu of maintenance or arrears of maintenance as distinct from property acquired at a partition. If a female Hindu does not have a pre-existing right to a share and she is not given property in lieu of maintenance or arrears of maintenance, but still if property is given to her under a partition deed it would be a case of pure gift. The mere fact that the property is given to the female Hindu under a partition deed would not mean that she did not acquire the property by way of gift and that she so acquired "at a partition". I am of the view that the words "acquired by a female Hindu........ at a partition" do not mean that she should not have had any pre-existing right in the property.

16. Assuming that the plaintiff did not acquire the suit properties under the partition on the ground that she had acquired them even earlier; I fail to see how the defendants can resist the plaintiff's claim. Undoubtedly the plaintiff was in possession of the suit properties when the Hindu Succession Act, came into force. There can be no dispute that the widow's estate of the plaintiff in the suit properties enlarged into an absolute estate by virtue of section 14 (1). But the purport of the contention of Mr. T. R. Ramachandran, is that not only the plaintiff but also the first defendant should be deemed to have been in possession of the suit properties (as well as other properties left by their husband), that the plaintiff cannot be said to have been in exclusive possession of the suit properties and that not only the plaintiff but also the first defendant got an absolute title to the suit properties and other properties. This contention is fallacious.

17. For the present discussion I am assuming that the partition of the year 1943, even though factually a final and absolute partition by consent of the two widows, is not valid in law as contended by the learned counsel for the defendants-appellants. But the question is

whether in spite of the partition the first defendant can be deemed to have been in joint possession of the suit properties with the plaintiff on the date when the Hindu Succession Act came into force. It is needless to stress that on facts there is a clear finding by the first appellate Court that by consent of the two widows there was a final and absolute partition of the properties left by their husband and that each widow was in separate possession of the properties that fell to her respective share. Even assuming that the widows had no right to effect such an absolute partition putting an end to the right of survivorship, I fail to see how the two widows can be said to have been in joint possession of the suit properties and other properties left by their husband. It cannot be disputed and in fact it is not disputed that whatever be the legal effect of the partition of the year 1943, the two widows were bound by that partition during their lifetime. In other words, they having effected by mutual consent a final partition, it was not open to any one of them to claim a re-allotment or possession of the properties allotted to the other. Under such circumstances, I am unable to agree with the contention that both the widows should be deemed to have been in joint possession of the entire estate in spite of the division of the year 1943. It is true that "possession" contemplated in section 14 (1) need not necessarily be physical possession but it would include constructive possession also. But I am quite clear that the first defendant cannot be deemed to have been in constructive possession of the suit properties in view of the partition of the year 1943, by which the two widows were bound during their lifetime. That means the first defendant does not get any right to the suit properties by virtue of section 14 (1) of the Hindu Succession Act.

18. There is no use saying that the right of survivorship continued on the ground that the widows had no right to effect a final and absolute partition. Assuming such a right continued, on the coming into force of the Hindu Succession Act, that right comes to an end (vide *Nagama Naicker* v. *Ponnuchinnayyan*)[1]. The plaintiff by virtue of the partition was in exclusive possession of the suit properties and the right of survivorship, even assuming that it continued, came to an end when the Hindu Succession Act came into force and the first defendant was neither in physical nor constructive possession of the suit properties nor had she any right to possession because of the partition of the year 1943 and therefore only the plaintiff's right to the suit properties enlarged into an absolute estate by virtue of section 14 (1).

19. The only other question argued is whether the second defendant is a cultivating tenant in respect of item No. 2 of the suit properties and whether he is entitled to protection under the Cultivating Tenants Protection Act. The contention on behalf of the defendants, as already said, is that the second defendant never denied the plaintiff's title and therefore the Courts below are not right in holding that he has forfeited the lease. I am unable to agree with this contention. In *Mohamed Amir* v. *Municipal Board, Sitapur*[2], on facts it had been held that there was no denial of title by the tenant. But that decision has no application to the present case because here undoubtedly the second defendant had denied the plaintiff's title and under the circumstances there can be no doubt that such denial was wilful. It is to be noted that within five months of the execution of the lease deed in favour of the plaintiff, the second defendant obtains a gift deed from the first defendant in respect of all the properties inclusive of the properties which he took on lease. The vary taking of the gift from the first defendant would go to show that he set up title in the first defendant and in himself. It is true that in the written statement the second defendant states that he neither denies nor affirms the plaintiff's title. But such a stand has evidently been taken only to get over the plaintiff's plea that the second defendant had forfeited the lease. Exhibit

1. (1970) 1 M.L.J. 437.
2. (1966) 1 S.C.J. 484 : A.I.R. 1965 S.C. 1923.

A-2 is the office copy of the notice dated 13th March, 1968 sent by the plaintiff to the defendants. In this notice the plaintiff charges the second defendant of having taken the settlement deed from the first defendant in derogation of his position as a lessee under her. Exhibit A-4 dated 29th March, 1968 is the reply notice by the second defendant through his advocate. In this reply the stand taken is that the gift under the settlement deed is perfectly valid. That undoubtedly means, the second defendant claims title to an undivided half share in item 2 of the suit properties (which is the one which he had taken on lease) among other properties. In fact, even in the suit, he does not give up his claim under the settlement deed. Under such circumstances, the self-serving statement by the second defendant made in his pleading that he neither denied nor affirmed the plaintiff's title is of no avail. Undoubtedly he is setting up a hostile title and therefore the finding that he has forfeited the lease is right.

20. The second appeal fails and the same is accordingly dismissed with costs.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*G. Ramanujam, J.*

Meenambal and others .. *Appellants**

v.

Chockalinga Chettiar and others .. *Respondents.*

Hindu Law—Partition—Suit for—Joint family properties—Registered partition between members where minors were represented by mother—Minor becoming major—Suit to set aside earlier partition as unfair and unequal—Suit filed more than three years after attaining majority—Partition made earlier not to be ignored where minor was eo nomine *a party—Bar of limitation also operates.*

On or about the 20th April, 1951, a registered partition came to be entered into between the first defendant, second defendant and the fourth defendant acting as guardian of the plaintiff and the third defendant who were then minors. The plaintiff who was born on 18th September, 1939 filed the suit on 2nd July, 1962 to set aside the earlier partition after attaining majority on the ground that the earlier partition was unfair and unequal and, therefore, was not valid and binding on the plaintiff. The defendants pleaded that the earlier partition was binding inasmuch as it was acted upon by all the parties and also that the suit was barred by limitation. The trial Court held that though the partition was unfair, unjust and unequal, the suit itself was barred by limitation, as the plaintiff had not filed the suit within three years after attaining majority. The plaintiff and some of the defendants filed appeals.

Held, the plaintiff in this case could not ignore the earlier transaction of partition to which he was *eo nomine* a party and proceed to ask for a fresh partition without setting aside the earlier partition either on the ground of fraud or illegality or on the ground that it was unfair and unequal and prejudicial. [*Para.* 23.]

The period of limitation before which the plaintiff should file a suit for setting aside the document of partition would be three years of his attaining majority. The plaintiff could not ignore or set aside the partition that took place (on 20th April, 1951) as the suit had been filed on 2nd July, 1962, three years after his attaining majority. [*Para.* 24.]

Cases referred to:

Lal Bahadur Singh v. *Sispal Singh*, (1892) I.L.R. 14 All. 498 ; *Ratnam Chettiar* v. *S.N. Kuppuswami*, (1976) 1 S.C.C. 214 : (1976) 1 S.C.R. 863: A.I.R. 1976 S.C. 1; *Chandirapa* v. *Danaya*, (1895) I.L.R. 19 Bom. 593 ; *Balakishan Das* v. *Ram Narain Sahu*, (1903) I.L.R. 30 Cal. 738 ; *Rangasayi* v. *Nagarathnamma*, (1934) I.L.R. 57 Mad. 95 : 38 L.W. 676 : 65 M.L.J. 630 : A.I.R. 1933 Mad. 890.

Appeal and memo. of cross-objections in A.S. 103 of 1970 against the decree of the Sub-Court, Vellore, dated 8th November, 1968 in O.S. No. 45 of 1964.

*A.S. No. 389 of 1969 and 103 of 1970.
10th February, 1977.

R. Vaidyanathan and *R. Ramaswamy Iyengar*, for Appellants.

R.S. Mani and *Balamukund Doss*, for Respondents.

The Court delivered the following

JUDGMENT.—Both these appeals arise out of the decision in O.S. No. 45 of 1964 on the file of the Sub-Court, Vellore. A.S.No. 389 of 1969 has been filed by defendants 18 to 22 and A.S. No. 103 of 1970 has been filed by the plaintiff in the said suit.

2. The said suit was one for partition of the lands described in Schedule C to the plaint into four shares and of the house described in Schedule B and the properties described in Schedule D into five shares, and for allotting the plaintiff one such share after setting aside the partition deed, dated 20th April, 1951, and the alienations of some of the suit properties by defendants 1 to 3, if need be, and for directing the first defendant to render accounts in respect of the joint family properties which were in her management from 1st October, 1951 till the date of the filing of the suit. The plaintiff and defendants 2 and 3 are brothers, being the sons of one Vengan Chetti, who died on 19th November, 1944, by his third wife, the fourth defendant. Vengan Chetti had another son, Perumal Chetti by his second wife and the said Perumal Chetti died on 1st April, 1951 and the first defendant is his widow.

3. According to the plaintiff the properties described in Schedules B, C and D to the plaint are properties left by Vengan Chetti and that on his death the plaintiff and defendants 2 and 3 and the deceased husband of the first defendant each became entitled to a one-fourth share in the agricultural properties and a one-fifth share in the non-agricultural properties, the fourth defendant being entitled to the balance one-fifth share in the non-agricultural properties. After Vengan's death the deceased husband of the first defendant being his eldest son was the manager of the joint family. On his death the first defendant, his wife, continued to manage the properties belonging to the joint family. On or about 20th April, 1951, a registered partition came to be entered into between the first defendant, second defendant and the fourth defendant acting as guardian of the plaintiff and the third defendant who were then minors. It is the case of the plaintiff that the said partition brought about by the partition deed dated 20th April, 1951, was unequal, unfair and unjust, that though the plaintiff and defendants 2 to 4 were together entitled to a 4/5th share in the non-agricultural properties and a 3/4th share in the agricultural properties, the first defendant had been allotted half share in the joint family properties absolutely for herself, that the first defendant has played a fraud on the plaintiff's mother and took a much larger share than what she was legally entitled to, that the plaintiff's mother was not competent to act as his guardian and she did not properly safeguard the minor's interest, that though the plaintiff's mother was entitled to a share in the properties she was not given any share in the partition, that valuable properties had been allotted to the first defendant while useless properties have been allotted to the share of the plaintiffs and defendants 2 and 3, that most of the moveables belonging to the joint family were not divided, but were allowed to be in the possession of the first defendant, that fictitious debts were allotted to the share of the first defendant while real debts were allotted to the share of the plaintiff and defendants 2 and 3, and that, therefore, the partition deed cannot be taken to be valid and binding on the plaintiff.

4. Perumal Chettiar, while he was the manager of the family had sold the lands described as items 14 to 16 in the plaint C Schedule to the 12th defendant under a registered sale-deed dated 12th November, 1948 for an alleged consideration of Rs. 3,000. The plaintiff's case is that the said sale is not supported by consideration nor was it made for any necessity or benefit of the family, that there was no need to sell any property belonging to the joint family as the income therefrom was considerable and that the said alienation is not binding on him or his share in the properties.

5. Subsequent to the death of Perumal Chettiar, defendants 2 and 3 have alienated the lands described in items 6 to 12 in the plaint C Schedule and the houses des-

cribed as items 3 and 6 in the plaint B Schedule to defendants 5 to 10 and 13 under various sale deeds. The first defendant had sold to the 11th defendant the oil mill and the machinery and the building described as item 1 of the plaint D Schedule with a view to defraud and defeat the rights of the plaintiff. According to the plaintiff the said sale deeds executed by defendants 1 to 3 are all fraudulent, void and not binding on him as they are not supported by consideration and they have been made without any necessity or benefit and that the recitals as to consideration, in those sale deeds are all false and fictitious.

6. Defendants 2 and 3 had executed a mortgage in favour of the 7th defendant. The plaintiff alleges that the said mortgage is not also supported by consideration and is, therefore, not binding on him.

7. The 13th defendant had sold the house described as items 3 in the plaint B Schedule to one Parthasarathi Chetti, and he having died, his legal representatives defendants 18 to 22 are in possession and enjoyment of the same. The plaintiff states that the said sale also is not binding on him.

8. The house described as item 4 in plaint B Schedule has been sold by defendants 2 to 4 during the minority of the plaintiff to one Mrs. Francis after taking an agreement of reconveyance in their favour. One Padmavathi Ammal, the 23rd defendant has purchased the right of reconveyance in Court auction. Subsequently, she purchased the said property on 24th April, 1965. The plaintiff contends that the said sale is not binding on him as the consideration for the transaction is quite inadequate and that there was no necessity for the said sale.

9. Subsequent to the institution of the suit, the first defendant died, and her legal representatives, defendants 14 to 17 have been brought on record.

10. Defendants 14 to 17, the legal representatives of the first defendant contended as follows:—After the death of Perumal Chettiar, the first defendant was not in management of the family properties, and it is the fourth defendant who was in management. Sometime after the death of Perumal Chetti all the heirs of Vengan Chetti desired to effect an amicable partition of the family properties. At the instance of Panchayatdars a registered partition deed dated 20th April, 1951 was executed between the parties. The fourth defendant did not act negligently in the said transaction, and no fraud was played upon her by the first defendant or by the Panchayatdars. The division is fair and equitable and, therefore, the plaintiff is not entitled to have it set aside. Even otherwise, the said partition deed has been acted upon by all the parties including the plaintiff. Some of the properties having been alienated to strangers by the sharers, it is not possible to go back on these transactions. The plaintiff having been born on 18th September, 1939, the present suit questioning the partition is barred by limitation as it has been filed more than three years after his attaining majority. The third defendant filed O.S. No. 373 of 1956 in the Court of the District Munsif, Vellore, for the same relief, but it was not prosecuted. The plaintiff was a party to the said suit and, therefore, the present suit was incompetent. As regards moveables, their case was that the first defendant was not in possession of any of the moveables, cash, jewels, and other valuables belonging to the family, and it is defendants 2 to 4 who were in possession of the same and are accountable.

11. Defendants 2 to 6 remained *ex parte*. The seventh defendant resisted the suit contending that the mortgage in his favour was executed by the plaintiff along with defendants 2 and 3 for Rs.2,500 and the borrowing was for necessary purpose. Hence, it is binding on the plaintiff. In any event, the suit is barred by limitation since the plaintiff was more than 21 years of age on the date of the filing of the suit.

12. The 8th defendant contested the suit contending that defendants 2 and 3 who were minor members of the joint family sold the lands described as items 9 to 12 in the plaint C Schedule for Rs. 2,000 on 17th November, 1961, that the sale was made for raising funds for installing a pumpset to a well belonging to the family

situate in S. No. 301 and for purchasing accessories thereto and for the discharge of a decree debt due to one Periasami Chettiar, that Rs. 500 was paid to him (*sic*) in cash on the date of the execution of the sale deed and the balance of Rs. 1,500 was paid in the presence of the Sub-Registrar to defendants 2 and 3 at the time of the registration, and, therefore, the plaintiff cannot seek to set aside the said alienation. The 8th defendant who is also a purchaser of items 6, 7 and 13 of plaint C schedule at Rs. 2,000, who had in turn purchased the same from defendants 2 and 3 by a sale deed dated 7th February, 1958 has filed an additional written statement stating that the sale of these items was made by defendants 2 and 3 and the 4th defendant acting as guardian of the minor plaintiff for the purpose of discharging the debts incurred by the family for litigation, and, therefore, the said sale is binding on the plaintiff.

13. The 9th defendant defended the suit contending that the mortgage in his favour was excuted by the second defendant in his capacity as joint family manager on 25th May, 1956 for discharging family debts and agricultural expenses, and, therefore, it is binding on the plaintiff.

14. The 11th defendant resisted the suit contending that she is a *bona fide* purchaser of the oil mill described as item 1 of the plaint D schedule and that even if there is a re-partition, the said item should be allotted to the share of the alienor in equity.

15. The 12th defendant who is the purchaser of items 14 to 16 of the plaint C schedule contended that Perumal Chetti and the 4th defendant were in need of money, for their business, and therefore, they persuaded her and her husband to purchase the said items for Rs. 3,000, that subsequent to the purchase she had made considerable improvements to the land by levelling them and putting up a well at a cost of Rs. 2,000, and, therefore the plaintiff is not entitled to question the sale and that in any event, she is entitled to get reimbursement of the cost of improvements.

16. The 13th defendant defended the suit contending that she has purchased item 3 of B schedule to the plaint in Court auction in pursuance of a decree obtained by one Parthasarathy Chetti in O.S. No. 143 of 1954 against the plaintiff and defendants 2 and 3. The legal representatives of the said Parthasarathi Chetti are defendants 18 to 22, and their case is that Perumal Chetti in his capacity as the manager of the joint family had become indebted to Messrs. S.T. Abboy Chettiar and Sons of Kancheepuram in the matter of purchase of javuli, that the said debt was allotted to the share of the plaintiff and defendants 2 and 3 in the partition entered into in 1951, that Parthasarathi Chetti filed a suit against the plaintiff and defendants 2 and 3 in O.S. No. 143 of 1954 and obtained a decree, that in pursuance of the decree he brought item 35 of the plaint B schedule for sale and the 13th defendant purchased it in Court auction and took passession through Court on 4th April, 1957, that subsequently, the 13th defendant transferred it to her deceased husband by a registered sale deed, dated 11th July, 1960 and that since then they are in possession of the same. Thus, the case of defendants 1, 3 and 18 to 22 is that the plaintiff being *eo nomine* party to the suit, O.S. No. 143 of 1954, the Court auction sale is binding on him, and, therefore, he is not entitled to question the validity of the same.

17. The 23rd defendant who is in possession of the house in item 4 of the plaint B schedule has filed a written statement stating that the said item was sold by the plaintiff and defendants 2, 3 and 4 to one Pushpammal on 10th August, 1957, that the vendee executed an agreement to reconvey the property on 26th August, 1957, that subsequently the vendors exercised their option and sold the same to one Mrs. Francis executing an agreement to reconvey in favour of defendants 2 to 4, that subsequently Pushpammal obtained a decree against the plaintiff and defendants 2 to 4 in O.S. No. 8 of 1961, and in execution of the said decree brought the said right of reconveyance to sale and that she had purchased it in Court auction on 26th August, 1963. She, therefore states that the plaintiff cannot challenge the various transactions. She also contended that she having been brought on

record only on 12th March, 1966, the claim as against her is barred by limitation.

18. On these rival contentions, the trial Court framed as many as 23 issues. Out of these issues, the substantial issues relate to the question of the validity and the binding nature of the partition deed and the question of limitation. After analysing the evidence adduced by the parties with reference to the various issues the Court below held on the main question that the partition brought about under Exhibit A-8, dated 20th April, 1951 between the first defendant, plaintiff and defendants 2 to 4 was unfair, unjust and unequal and is also prejudicial to the plaintiff who was a minor. It however held on the question of limitation that the suit to set aside the partition deed under Exhibit A-8 not having been filed by the plaintiff within 3 years after attaining majority, the claim for setting aside the partition deed is barred by limitation, but that the plaintiff's claim to a share in the joint family properties alienated by defendants 2 to 4 subsequent to the partition was not barred by limitation as the suit was well within 12 years of the date of alienation. On its view that the claim for setting aside the partition deed is barred by limitation, the lower Court has not chosen to give any relief to the plaintiff for fresh partition as sought for by him. As regards the relief claimed as against the alienees from defendants 2 to 4, the lower Court rejected the plaintiff's claim in respect of alienations of items 1, 2 and 4 of B schedule and items 1 to 7 and 13 to 16 of C schedule. The plaintiff has, therefore, filed A.S. No. 103 of 1970 against the decision of the lower Court holding that the claim for setting aside the earlier partition deed under Exhibit A-8 is barred by limitation as also the finding of the lower Court in relation to items 1, 2 and 4 of B schedule and items 1 to 7 and 13 to 16 of C schedule. The plaintiff has not chosen to question the findings of the trial Court in respect of other alienated items.

19. As against the finding of the lower Court relating to the setting aside of the alienation of item 3 of B schedule, defendants 18 to 22 have filed A.S. No. 399 of 1969 contending that the alienation made by defendants 2 and 3 to the 13th defendant is valid and binding on the plaintiff and that the subsequent alienation by the 13th defendant in favour of Parthasarathi Chetty was legal and valid.

20. Thus the main question that has to be considered in the plaintiff's appeal A.S. No. 103 of 1970 is as to whether the plaintiff can seek to set aside the earlier partition to which he was *eo nomine* a party beyond 3 years after attaining majority. The learned counsel for the plaintiff contends before me that once the partition is found to be unequal, unfair, unjust and prejudicial to the minor, it need not be set aside within three years of attaining majority; but that it can be ignored altogether, and that in any event, even if such a partition is to be set aside, the limitation has to start only from the date of the knowledge of the unfairness of the partition. The question is how far the above contention can be accepted.

21. As already pointed out, the lower Court has given a finding that the partition under Exhibit A-8 is unfair, unequa and prejudicial to the interests of th minors. This finding which is in favou of the plaintiff has not been challenge by the respondents or by the appellant in A.S. No. 389 of 1969. I have to therefore, proceed on the basis of th said finding. The learned counsel, i support of his submission, that onc the partition deed is found to be unfai and unequal it can be ignored and n setting aside is necessary, refers to th following decisions.

22. In *Lal Bahadur Singh* v. *Sispal Singh* certain members of the joint fami partitioned the family properties amo them in such a way as to give one memb of the family who, at the time of t partition was a minor, less than t share to which he was entitled. T minor was represented in the partiti by his uncle who was not a natu guardian. The minor, on attaini majority brought a suit for recovery the full share to which he was entitl

1. (1892) I.L.R 14 All. 498.

It was held by a Division Bench that the suit was not one for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor and that therefore, the suit was not subject to the limitation of three years prescribed by Articles 95 and 96 of the second schedule of Act XV of 1877. But, the said ruling is based on the special facts of that case where the minor was not bound by his uncle's act, that the uncle had no authority to barter away the minor's rights and, that therefore, the minor can ignore the partition entered into by his uncle. In *Ratnam Chettiar* v. *S. N. Kuppuswami*[1], a partition effected between the members of a Hindu undivided family was challenged on the ground that it was unfair, unjust and detrimental to the interests of certain minor coparceners. The Supreme Court pointed out that when the partition is effected between the members of the Hindu undivided family which consists of minor coparceners it is binding on the minors also if it is done in good faith and in *bona fide* manner taking into account the interests of the minors, that where, however, a partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors, the partition can certainly be reopened whatever the length of time when the partition took place. But, this decision cannot be taken to be an authority for the proposition that whenever the partition is found to be unfair and unequal the same can be set aside without reference to the question of limitation. In the same decision the Supreme Court has pointed out:

> "It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even so, so long as there is no fraud, unfair dealing or over-reaching by one member as against another, Hindu law requires that a *bona fide* partition made on the basis of the common consent of coparceners must be respected and is irrevocable."

In this case, in the partition under Exhibit A-8, the plaintiff was represented by his mother, the fourth defendant. The partition has also been acted upon. Even assuming that the partition is found to be unfair, unequal and unjust, the plaintiff having been represented by his natural guardian is bound by the said partition until it is set aside at his instance on attaining majority. The above decision of the Supreme Court does not deal with the question of limitation for a suit to set aside a partition by a quondam minor, but it only deals with the right of the quondam minor to have the partition set aside on the ground that the partition is uneaual and unfair.

25. In *Chandirapa* v. *Danaya*[1] it was held that a partition made by a mother as guardian of her minor son is valid, that if it is just and legal it will bind the minor, that when the minor arrives at full age, he can however have it set aside if it can be shown to be illegal or fraudulent, and that a suit to set aside a partition by a minor is governed by Article 91 or 95, Schedule II of the Limitation Act XXV of 1877 and must be brought within three years after the minor attained majority. In *Balkishan Das* v. *Ram Narain Sahu*[2] the Privy Council observed:

> "The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding upon the coparceners, who were minors at the date of it. But they think that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt, if the partition

1. (1976) 1 S.C.C. 214: (1976) 1 S.C.R. 863: A.I.R. 1976 S.C. 1.

1. (1895) I.L.R. 19 Bom. 593.
2. (1903) I.L.R. 30 Cal. 738.

was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself."

In *Rangasayi* v. *Nagarathnamma*[1], a Full Bench of this Court pointed out that a valid partition could be made outside the Court by the members of a joint family though some were minors at that time, that it is open to the adult coparceners to express their intention to separate from others, that even though some coparceners are minors such intention to separate may be communicated to the mothers or other natural guardians of the minors, that a partition effected by the adult coparceners with the mothers or other natural guardians of the minor coparceners representing the minors would be a valid partition and would be binding on the minors though it would be open to the minors when they come of age to take steps to have such a partition modified if their proper shares of the joint family property have not been secured to them. From the above decisions it is clear that the plaintiff in this case cannot ignore the earlier transaction of partition to which he was *eo nomine* a party and proceed to ask for a fresh partition without setting aside the earlier partition either on the ground of fraud or illegality or on the ground that it is unfair and unequal and prejudicial.

24. If the earlier partition is to be set aside by the plaintiff, the question is as to what is the period of limitation for such a suit. According to the learned counsel, limitation will begin from the date of knowledge of the illegality or unfairness and not from the date of the plaintiff attaining majority. It is said that the plaintiff became aware of the fact that the partition is unfair and unequal only on 16th February, 1960, I am not inclined to agree with the learned counsel that the three years will not commence from the date of the plaintiff attaining majority. The minor as soon as he attains majority should be taken to have knowledge of the transactions entered into by the guardian during his minority. Therefore, the plaintiff should be taken to have had knowledge of the transaction on his attaining majority. Therefore, the period of limitation before which he should file a suit for setting aside the document of partition will be three years of his attaining majority. I have to, therefore, agree with the Court below that the plaintiff cannot ignore or set aside the partition that took place under Exhibit A-8 as the suit has been filed on 2nd July, 1962, three years after his attaining majority. Though the plaintiff came forward with a case that his date of birth is 2nd July, 1941, the lower Court has not accepted his case, and it has specifically found that the plaintiff was born on 15th September, 1939, and no material has been placed before this Court to take a contrary view.

25. The next question is whether the plaintiff can challenge the alienation to items 1, 2 and 4 of B schedule and 1 to 7 and 13 to 16 of C schedule and item 1 of D schedule.

* * * *

[The discussion of facts is omitted—Ed.]

It is not the case of the plaintiff that he offered to repurchase the property by tendering the price and that defendants 5 and 6 or the 8th defendant refused the tender. The plaintiff not having exercised his option within the time stipulated, has no right to claim reconveyance of these properties. The plaintiff is not therefore entitled to any relief in respect of the said items of properties. App. No. 103 of 1970 has, therefore, to fail.

26. App. No. 389 of 1969 has been filed by defendants 18 to 22 as regards item 3 of B schedule which has been decreed by the lower Court in favour of the plaintiff.

* * * *

[The discussion of facts is omitted.—Ed.]

Exhibit B-27 shows that the 13th defendant took possession of the property purchased by him in Court auction in Exhibit A-442 of 1957 in O.S. No. 143

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1. (1934) I.L.R. 57 Mad. 95 : 38 L.W. 676 65 M.L.J. 630: A I R. 1933 Mad. 890 (F.B.).

of 1954 on the file of the District Munsif, Vellore, on 4th April, 1957. Therefore, having regard to the fact that the plaintiff was *eo nomine* party in the suit in O.S. No. 143 of 1954, and the execution proceedings thereon, the plaintiff cannot now challenge the validity of the decree or the said Court auction sale. On a due consideration of the matter, I am of the view that the lower Court is in error in upholding the plaintiff's claim as regards item 3 of B schedule. Defendants 18 to 22 have acquired a valid title in relation to this item by a transfer from the 13th defendant who had in turn purchased the same in Court auction in execution of a decree obtained against the plaintiff and other defendants by the husband of the 18th defendant. A. S. No. 389 of 1969 has, therefore, to be allowed.

27. The 7th respondent in A.S. No. 103 of 1970 has filed a memorandum of cross objections, and these objections relate to three minor matters.

[The discussion of facts is omitted—Ed.]

* * * *

Therefore, this objection of the cross-objector has to be upheld. Therefore, the decree of the lower Court will be modified to indicate that the suit as against the 8th defendant as also item 13 is also dismissed so as to bring it in accord with the judgment. The cross-objections are ordered accordingly.

28. In the result, A.S. No. 103 of 1970 is dismissed with costs of contesting defendants, one set, A.S. No. 389 of 1969 is allowed with costs. The cross-objections in A.S. No. 103 of 1970 is partly allowed. There will, however, be no order as to costs in the memorandum of cross objections. C.M.P. No. 10696 of 1975 is dismissed as unnecessary.

S.J. ——— *A.S.No.* 103 of 1970 *dismissed.*
A.S. No 389 *of* 1969 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.*

G. Shanmugham Chetty and another .. *Appellants**

v.

Chinnammal .. *Respondent.*

Indian Succession Act (XXXIX of 1925), *section* 263, Explanation—*Revocation of earlier grant—When can be made—Allegation of fraud to be specifically pleaded and proved—Just cause—What is—Discretion to be exercised judiciously.*

The discretion vested in the probate Court either to revoke or annul an earlier grant has to be judiciously exercised. It is not every non-conformity with procedural irregularities which were not made an issue at the time of the grant, nor such infirmities which do not shake the foundation of the grant that would ever be the cause for revocation or annulment of an earlier grant. The expression 'just cause' explained in section 263 of the Indian Succession Act, is obviously illustrative and not exhaustive. There may be cases where a just cause for revocation or annulment is available, even though they may not strictly come within the framework of the illustrations given in the *Explanation* to section 263 of the Act. A mere error in form and procedure but not in substance cannot vitiate an earlier grant. If, in a given case, fraud is alleged or a material concealment is suggested such fraud must not only be pleaded, but also be proved at least *prima facie* to enable the Court to re-act and issue a direction by way of a citation to the primary grantees to lodge the original letters of administration in Court. Vague suggestions about concealment which do not go to the root of the matter and which are not material to the case, cannot also be considered as a just cause for revoca-

*O.S.A. No. 4 of 1975. *6th October,* 1977.

tion. In effect, therefore, there must be abundant material which is acceptable to a reasonable person to come to the conclusion that the Court has been misled in making the original grant and that there was a deliberate design and motive for the making of untrue allegations of facts which are essential in point of law. No doubt the propounders of the will cannot take shelter by pleading that an untrue allegation of fact which is essential in point of law, was ignorantly or inadvertently made. If an allegation has been proved to be untrue and if that fact formed as it were the basis for the grant in law, then also the statute assumes by way of a fiction that there is just cause for revocation. [*Para.* 7.]

If once it is conceded that there was a will, a mistake in the application for grant of letters of administration relating to the place of the testator's death or the non-mention of the time of death is not substantial matter which would come within clause (1) of the *Explanation* to section 263. Nor could it be said that within the meaning of clause (*b*) or (*c*) there was a fraudulent suppression of true materials and projection of false particulars of facts essentially in point of law to jusify the grant.

[*Para.* 8.]

The order revoking the order of the issue of letters of administration was set aside.

Cases referred to:—

Anil Behari Gosh v. *Latika Bala Dassi*, 1955 S.C.J. 578: (1955) 2 M.L.J. (S. C.) 84: (1955) 2 S.C.R. 270: A.I.R. 1955 S.C. 566; *Sheopati Kuer* v. *Ramakant Dikshit*, A.I.R. 1947 Pat. 434; *Venkataraman* v. *Janamandra Satyavati*, (1924) 46 M.L.J. 383: A.I.R. 1924 Mad. 578.

Appeal under clause 15 of the Letters Patent and Order 36, rule 11 of O.S. Rules against the order of the Honourable Justice Mohan dated 20th November, 1974 and made in the exercise of the Testamentary and Intestate Jurisdiction of this Court in Application No. 1218 of 1974 in O.P. No. 287 of 1973.

S. Govind Swaminathan for *M. Ramachandran*, for Appellants.

V. M. Lenin, for Respondent.

The Order of the Court was made by

Ramaprasada Rao, J.—This is an appeal against the judgment of Mohan, J., who on an application filed by the respondent in this appeal revoked the probate granted in favour of the appellant by Paul, J. This order is dated 14th February, 1974 whereunder he granted letters of administration to the will of one Alagiriswami Chetty. The respondent applicant has briefly stated in the affidavit in support of the Judge's summons for revocation as follows:—

2. She was admittedly a person to whom notice was ordered before the grant was made. But according to the respondent such a notice which was served on her on 12th January, 1974 was not accompanied by the copy of the petition filed for the grant and that no publication was made about the date of hearing of the testamentary proceedings and that she sought for inspection of the records as per order of the Master of this Court dated 19th March, 1974 and it was only thereafter she entered caveat. But as by then the letters of administration was ordered on 14th February, 1974, the respondent's allegation is that the grant was obtained on false and fraudulent misrepresentation. She concedes that she has questioned the legality of the will in earlier proceedings, but could not prosecute the litigation for want of funds. She is also aggrieved over the form of the petition in that her name was not impleaded as one of the respondents. According to her Alagiriswami Chetty, the testator, who is her husband, was under medical treatment and that the appellants manipulated to get a will from him to her prejudice and to their advantage. She refers to the prior litigation to which she was a party and to which we shall presently make a reference to and would add that when the counsel for the appellants were contacted for a copy of the original petition by the clerk of the respondent's counsel, it was not even

handed over to him. Her further allegation is that in the petition for the issue of the grant, there are two important aspects which have been suppressed, namely, about the place of death of the testator and about the incompleteness of the affidavit of assets. According to her, the will dated 24th November, 1964 was revoked by a further will by the testator himself in his last will and testament dated 17th March, 1966 and that, therefore the grant of such a will which has been subsequently cancelled by the testator ought not to remain on record, Paul, J., granted the letters of administration after following the usual procedure. Mohan, J., however, thought that the allegations made by the respondent in the affidavit for revocation of the grant were sufficient to revoke it and directed a citation to issue to the appellants to lodge the original letters of administration in this Court. The appellants in spite of their opposition to the application for the revocation for the grant could not succeed. Hence, the appeal.

3. We shall now trace the earlier history of this litigation, as it would furnish a sufficient background for the appreciation of the facts and circumstances of the subject-matter.

4. On 12th December, 1959 and 2nd May, 1960, Alagiriswami Chetty executed two deeds of settlement which were questioned by the respondent. The result of it was a suit in this Court in C.S. No. 46 of 1962 for maintenance of the respondent. This suit ended in a compromise whereunder she was awarded a sum of Rs. 500 as and towards her maintenance and thereafter the above suit which was to set aside the settlement deeds ended. Then Alagiriswami Chetty executed the will which was the subject-matter of the grant by Paul, J., on 14th February, 1974, lived for two years and more thereafter and died on 17th March, 1966. Once again the respondent initiated proceedings questioning the settlement deeds and the will. A pauper Application No. 361 of 1967 to that effect was filed. In those proceedings filed *in forma pauperis* Application No. 509 of 1967 was taken for the appointment of a receiver. One of us dismissed the said application. The Master of this Court who heard the main pauper Application No. 361 of 1967 dismissed the same. A further appeal by the respondent to Palaniswamy, J., sitting on the original side was also unsuccessful. In the pauper application filed by her in 1967 and until it was dismissed by this Court on 6th March, 1970 there was no whisper at all anywhere in the pleadings that the will dated 24th November, 1964 was ever revoked. This allegation made by the respondent looms large in the present proceedings under appeal and in fact, the learned single Judge, who revoked the probate almost accepted this contention. After the challenge against the will dated 24th November, 1964, which is obviously the only will, ended in 1970, the appellants filed for letters of administration of the said will in O.P. No. 287 of 1973. In that petition though *eo nomine* the respondent was not made a respondent to the said original petition, yet in paragraph 8 to that petition, the appellants have stated that the respondent was the junior widow of Alagiriswami Chetty. They filed for the grant of letters of administration as sole beneficiaries under the will and would say that the delay in seeking for the relief of the grant of letters of administration was not deliberate or wilful and that they were engaged in their business activities and hence could not come up earlier. To this they annexed the affidavit of assets. It is common ground that under directions of the learned Judge sitting in testamentary and intestate jurisdiction, notices were issued amongst others to the respondent about the application of the appellants for the grant of letters of administration with the will annexed of the will dated 21st November, 1964 of V. Alagiriswami Chetty.

5. With the above background we shall now consider the allegations of the applicant. The first allegation is that though notice of the Original Petition No. 287 of 1973 for the issuance of the grant was sought to be served on her on 12th Janu-

ary, 1974, it was not accompanied by a copy of the petition in support thereof and that notice was not in the prescribed form. According to her she contacted her advocate who wanted her to keep a watch on the daily paper whereunder notice will be published about the date of hearing and she alleges that no such publication was made and that she came to know about the contents of the petition only after she inspected the records under orders of the Master of this Court. Countering this allegation, the appellants would plead that no advocate entered appearance at that stage for her and that a person representing himself to be a clerk of the advocate approached the appellants' advocates and wanted a copy. The person, who approached the advocate was informed that the advocate said to have been engaged by the respondent should have either entered appearance in the High Court or should at least write a letter to him asking for a copy. Thereafter, the matter ended there. The appellants' case is that due notice of the hearing of the petition for the grant was published in the dailies, one in the Madras Mail and the other in Swadesamitran and it is, therefore incorrect to suggest that no such publication was made. The first allegation is without substance. We are of the view that the background of the case already referred to by us and the specific allegation about the publication of the proceedings in the details were not brought before the notice of the learned Judge. He was obviously persuaded by the fact that merely because she entered a caveat, but after some delay the letters of administration granted earlier ought not to stand and that it ought to be revoked. We are unable to share the view. There is nothing on record to show that as to who entered appearance for the respondent at or about the time when she sought for a copy of the petition. The learned counsel for the respondent appearing before us is unable to satisfy us that there was a genuine request made in writing by a competent or an authorised person seeking for a copy of the petition in support of O.P. No. 287 of 1973. The first objection therefore fails.

6. The second objection on merits is that there has been a suppression of true facts on important aspects. Firstly, it is said that the appellants in their petition incorrectly described the place of death as the Nursing Home, when, in fact, he died in the house and that the affidavit of assets is neither full nor complete. How the assets are incomplete is not elucidated before us: The mere fact that there is a mistake in the petition about the place of death of the testator cannot form the foundation for refusal of a grant or of the revocation of a proper grant made by a competent Court. It is in this context that the earlier history of this case looms large. The respondent was challenging the validity of the will dated 21st November, 1964. We have already made it clear that at no point of time, she referred to the other will and much less to a last will of Alagiriswami Chetty dated 17th March, 1966 said to have been written up by him. It is admitted before us that in the pauper Application No. 361 of 1967, which was filed long after the date of execution of the alleged second will which apparently she was aware of and which was to her benefit was not adverted to till she filed the present application for revocation of the grant in 1974. The merits therefore in the above case which primarily revolve round the above facts are so simple and clinching. They do not prompt us to accede to the request of the respondent to sustain the order of revocation made by Mohan, J. In fact, one of us, while dealing with the application for appointment of a receiver in the pauper suit as above expressed that there was no pleading in support of the application that fraud, misrepresentation or undue influence affected the will in question. Regarding the allegation that the affidavit of assets does not disclose the correct state of affairs, no material has been placed before us to show that the contents therein are either untrue or incorrect. The exaggerated value given by the respondent that the estate is worth Rs. 20 lakhs remains only as a bare statement. Finding that the merits in this case are so very clear and unambiguous, learned counsel for the res-

spondent who was asked to sustain the order appealed against based his arguments mostly on alleged legal infirmities in the matter of the grant.

7. Strong reliance was placed upon section 263 of the Indian Succession Act, which reads as follows:

> "263. The grant of probate or letters of administration may be revoked or annulled for just cause.
>
> *Explanation*:—Just cause shall be deemed to exist where ....
>
> (*a*) the proceedings to obtain the grant were detective in substance; or
>
> (*b*) the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case; or
>
> (*c*) the grant was obtained by means of an untrue allegation of a fact...... essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
>
> (*d*) the grant has become useless and inoperative through circumstances; or
>
> (*e*) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

The discretion vested in the probate Court either to revoke or annul the earlier grant has to be judiciously exercised. It is not every non-conformity with procedural irregularities which were not made an issue at the time of the grant, nor such infirmities which do not shake the foundation of the grant would ever be the cause for revocation or annulment of an earlier grant. The expression 'just cause' explained in section 263 of the Indian Succession Act is obviously illustrative and not exhaustime. There may be cases where a just cause for revocation or annulment is available, even though they may not strictly come pithin the framework of the illustrations given in the *Explanation* to section 263 of the Act. A mere error in form and procedure but not in substance cannot vitiate as earlier grant. If in a given case fraud is alleged or a material concealment is suggested such fraud must not only be pleaded, but also be proved at least *prima facie* to enable the Court to re-act and issue a direction by way of a citation to the primary grantees to lodge the original letters of administration in Court. Vague suggestions about concealment which do not go into the root of the matter and which is not material to the case, cannot also be considered as a just cause for revocation. In effect, therefore, there must be abundant material which is acceptable to a reasonable person to come to the conclusion that the Court has been misled in making the original grant and that there was a deliberate design and a motive for the making of untrue allegations of facts which are essential in point of law. No doubt the propounders of the will cannot take shelter by pleading that an untrue allegation of fact which is essential in point of law, was ignorantly or inadvertently made. If an allegation has been proved to be untrue and if that fact formed as it were the basis for the grant in law, then also the statute assumes by way of a fiction that there is just cause for revocation. The other illustrative cases in the *Explanation* to section 263 of the Act which would enable the Court to revoke an earlier grant are where the grant has become useless or inoperative and where the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account or exhibited, one which is untrue in material particulars. The argument of the learned counsel for the respondent is that the proceedings were detective in substance and the grant was obtained fraudulently by making false allegations and that there has been a wilful omission to disclose a true inventory. As regards the latter two objections there is no proof of such fraud or concealment of material particulars. What is argued is that the time of the death of the testator was not mentioned in the application for letters of administration

and even so the place where he died has been incorrectly stated.

8. Another contention is that the alleged last will of Alagiriswami Chetty said to have been executed by him in 1966 has been wantonly suppressed. These objections could easily be answered. It is not in dispute that Alagiriswami Chetty executed an enforceable and a valid will on 21st November, 1964. It was this will which was the subject-matter of the earlier proceedings in Pauper Application No. 361 of 1967. The respondent did not pursue the matter proceedings *in forma pauperis*. Even after she was not enabled to prosecute her at that time there was no whisper that there was a second will of Alagiriswami Chetty said to have been executed on 17th March, 1966. The allegation is that Alagiriswami Chetty made out a will but could not register it. This fact is only pleaded in the present application for revocation. It was not even touched upon or referred to in the earlier proceedings. If once it is conceded by the respondent that there was a will dated 21st November, 1964 a mistake in the application for the grant relating to the place of death of the testator or the non-mention of the time of death are not substantial matters which would come within clause (1) to the *Explanation* to section 263 of the Indian Succession Act. Nor could it be said that within the meaning of clause (*b*) or (*c*) there was a fraudulant suppression of true materials and the projection of false particulars or facts essential in point of law to justify the grant.

9. One other factor pressed into service under this clause of defective issue of the grant is that the respondent was not made *eo nomine* a party to the Original Petition and that citation was issued to her only by Court after the scrutiny of the application for the grant of letters of administration. The fact that a person is not made a party to a proceeding cannot always and necessarily be understood as a proceeding which is defective in substance. When the person interested to enter a caveat has been notified either by a special notice through Court or by general publication in the dailies as is contemplated under rule 30 and rule 32 of the Original Side Rules obtaining in the High Court of Judicature at Madras, then it cannot be said that the proceedings to obtain the grant were defective in substance. Though a vague allegation was made that no publications were made, it is now proved beyond doubt that such publications were made and a citation was also issued to the respondent about the pendency of the proceeding to obtain the grant. The respondent attempted to contact the counsel appearing for the propounders of the will through a clerk who did not have the requisite authority to obtain a copy of the affidavit and the petition for the grant. The appellants' case is that "somebody came with a request for a copy of the petition and he was asked to obtain the requisite authority from a duly appointed counsel so that they could give a copy of such petition and affidavit." It is not the case of the respondent that on the date when a request was made for a copy of the affidavit and the petition, her counsel entered appearance. It is not even suggested that the clerk who approached the counsel for the appellants was authorised to get the copy of the petition and the affidavit. In those circumstances, we are unable to infer any fraud, false suggestion or untrue allegation of a fact essential in point of law not to justify the grant.

10. The history of this litigation which started in 1959 clearly establishes that the respondent had knowledge of the will executed by Alagiriswami Chetty on 21st November, 1964. She attempted to challenge its validity in a civil proceeding. She could not successfully do it. Her own case is that she was alerted by her lawyer to keep a watch on the daily papers wherein a notice will be published about the testamentary proceedings. She was admittedly served with notice on 12th January, 1974. Excepting for the bare pleading which now appears to be incorrect that there was no publication, the conduct of the respondent is neither clear nor *bona fide* in not having appeared in Court and made the proceedings a contentious one.

11. The allegations of fraud or the averment as to the so-called untrue allegations must be real and should not stand as bare imputations. This is a case which a citation has been issued to the respondent. No factual material has been placed before us so as to compel the exercise of our judicial discretion to revoke the grant and we are not provoked to come to the conclusion that it is necessary to have the will proved afresh. Even in a case where there was an omission as to citation, the Supreme Court in *Anil Behari Gosh* v. *Latika Bala Dassi*[1] stated thus:—

> "The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case".

A fortiori therefore, if an opportunity to convert a petition into a contentious suit was given to the respondent and if the respondent, as is seen from her earlier conduct, did not pursue her challenge against the will, which she initiated in 1967, it cannot be said a citation issued to her without making her a party to the original proceedings, is sufficient for the revocation of the original grant.

12. A Bench of the Patna High Court in *Sheopati Kuer* v. *Ramakant Dikshit*[2], held the view that a defect arising out of the absence of citation on the proper person is not a defect of substance and therefore, not a just cause.

13. A case more less *in pari materia* with the case before us arose in our Court which was decided by a division Bench in *Venkataraman* v. *Yanamandra Satyavati*[3]. The question which arose therein was not doubt under section 50 of the Probate and Administration Act. It is common ground that the expression "just cause" appearing in section 50 of the above Act is similar to the present provision in section 263 of the Indian Succession Act. The learned Judges invoked the principles of *res judicata* and refused to revoke also a grant merely on the ground of an irregular citation in the proceedings. Following an earlier decision of the Calcutta High Court, the learned Judges agreed with the view that the mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a 'just cause' for revocation. In that case the will was the subject-matter of an earlier litigation and when an occasion arose for the Judges to consider whether such an earlier grant could be revoked, they observed that even on the principle of *res judicata* the application for revocation is not maintainable. They finally said that it is an elementary principle that where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later and no Court would, in their opinion allow a 'just cause' already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke that grant, and it saw no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. In the instant case the knowledge of the respondent about the existence of the will and the attempts made by her to challenge the same in a civil Court in which she failed, are all important factors to be taken into consideration while adjudicating upon the fact whether there is a just cause for revocation. The respondent had the full opportunity of putting forward her just cause even at the time when she was served with the citation. She did not do so for reasons known to her. She cannot, therefore, be permitted to invoke the just and equitable rule in section 263 of the Indian Succession Act and ask the Court to revoke the original grant. Moreover the respondent has not given

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1. 1955 S.C.J. 578: (1955) 2 M.L.J. (S.C.) 84: (1955) 2 S.C.R. 270: A.I.R. 1955 S.C. 566.
2. A.I.R. 1947 Pat. 434.
3. (1924) 46 M.L.J. 383: A.I.R. 1924 Mad 578.

any details about the second will also, which she claims she has full knowledge of. The learned Judge who revoked the grant was satisfied that there was another will dated 17th March, 1966. But it should be noted that this was not the case of the respondent in the earlier litigation. This appears to be an afterthought.

14. The second ground on which the learned Judge was apparently satisfied that there is just cause for revocation is based upon the fact that the respondent took earnest efforts to enter a caveat. No doubt, there is no inordinate delay in this case. But the circumstance to be noted is that after citation and after publication which was both to her knowledge, she did not enter caveat and challenge the grant. What she ought to have done she did not do. She cannot, therefore, in a circuitous manner and after having pretended to have inspected the records in March, 1974 and obtained information about the grant of the probate seek for revocation of the grant. We are unable to share the view that the conduct of the respondent in the earlier litigation is not sufficient in this case to hold that there is no just cause at all for such revocation.

15. One other ground which was pressed into service anew by the learned counsel was based on section 57 of the Indian Succession Act read with the provisions of the Hindu Succession Act of 1956. Under section 30 of the Hindu Succession Act any Hindu may dispose of by will or other testamentary disposition which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to Hindus. The other portions of the section are not necessary to be noticed. We are unable to understand the implication of the argument as to how the grant is hit by the provisions of section 30 of the Hindu Succession Act. The respondent's case is that Alagiriswami Chetty could dispose of his property under a will and this is what he did.

16. We have already referred to the fact that there has not been a substantiation of the allegation that the appellants to whom the grant was made originally have wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of the Succession Act or that they have exhibited an inventory or account which is untrue in material respects. Excepting for the bare *ipse dixit* and unproved allegations in the pleadings that the estate is worth much more, there is nothing to indicate that the inventory filed or account rendered by the appellants was in any way untrue nor were material particulars omitted without reasonable cause.

17. Since the respondent should be deemed to have had full knowledge of the proceedings initiated by the appellants in Court in O.P. No. 287 of 1973 and since she failed to take any effort much less earnest effort to enter a caveat and as in the background of events she should be deemed to have avoided a contentious proceeding, since she could not substantiate it in her earlier litigation and since she failed to act at a time when she should have and for the reasons that there was no proof that there was a will dated 17th March, 1966 and for all the reasons above stated, we allow this appeal and set aside the judgment of Mohan, J., who revoked the order for the issuance of the letters of administration made by Paul, J., on 14th February, 1974.

18. The Original Side Appeal is allowed, but there will be no order as to costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

Charles Robson .. *Petitioner**

v.

The State of Tamil Nadu represented by the Secretary to Government, Education Department, Madras-9 and another .. *Respondents.*

Constitution of India (1950), *Article* 30 — *Petitioner correspondent of High School—Temporary recognition granted to school—Both boys and girls admitted —Exclusive Girls' School* 400 *yards away —G.O. No.* 1664, *Education Department dated* 19*th October,* 1972 *passed against admission of girl students in Boys' School when there was separate Girls' school except wits approval of inspecting officer—Petitioner's school called upon to obey terms of the G.O. — Government grant withheld — Fundamental right of petitioner, if violated— G.O. whether liable to be struck down —G.O. only regulatory.*

In the present case, the right to establish an educational institution is not in any way interfered with. The administration is not interfered with because of the direction by the Government to the petitioner not to admit girls when an exclusive girls school is available at a distance of 400 yards from the petitioner's school. The petitioner's right to impart education to boys is not in any way interfered with. Therefore it does not pertain to the realm of administration. Looked at from that point of view, no right of the petitioner has been violated. [*Para.* 10.]

A careful reading of G.O. No. 164, Education Department, dated 19th October, 1972 clearly shows that it is merely regulatory in character since it says that, in areas where there are separate girls' schools, girls should not under any circumstance be admitted in boys' schools except with the specific and prior approval of the inspecting officer and that too for valid reasons. It does not deny the petitioner the right, but merely requires him to obtain prior approval. This may be a good policy from the view of the Government. The Court cannot concern itself with the wisdom of such policy and hold that some right of the petitioner has been infringed. [*Para.* 11.]

Cases referred to:—

Director of School Education v. *Rev. Brother C. Arogiaswamy,* (1971) 1 M.L.J. 325: 84 L.W. 195: A.I.R. 1971 Mad. 440; *Rev. Br. A. Thomas* v. *Dy. Director of Schools,* (1975) 1 M.L.J. 353: 88 L.W. 791: A.I.R. 1976 Mad. 214; *St. Xavier's College* v. *State of Gujarat,* (1974) 2 S.C.J. 381: (1975) 1 S.C.R. 173: A.I.R. 1974 S. C. 1389; *Rt. Rev. M. S. G. R. Mark Netto* v. *Government of Kerala,* 1976 K.L.T. 312: A.I.R. 1977 Ker. 58; *Kerala Education Bill case,* 1959 S.C.R. 995: 1959 S.C.J. 321: A.I.R. 1958 S.C. 956.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* filed *mandamus* calling for the records in G.O. Ms. No. 1664, Education, dated 19th October, 1972 on the file of 1st respondent and the consequential order of the 2nd respondent in R.C. No. 247819 E2 of 1974 dated 18th June, 1975 and to quash the said orders and to direct the respondents and their subordinates and agents to forbear from interfering with the right of the petitioner in admitting girls in Dr. Samuel High School, Santhapuram, Kanyakumari District.

T. Martin, for Petitioner.

N. R. Chandran, Government Pleader, for Respondents.

The Court made the following

ORDER:—This writ petition for *certiorari* filed *mandamus* arises under the following circumstances. The petitioner is

* W.P.No. 4448 of 1975.

16*th December,* 1977.

the Manager and Correspondent of Dr. Samuel High School at Santhapuram at Kanyakumari District. He belongs to C.S.I. Christian Community and he is an Indian Christian. He is running a school which was established in 1935. It began with a preparatory class by the said Dr. Samuel, who is none other than the father of the petitioner. The school became an English medium School during the year 1938-39 with preparatory class to Form III. Both boys and girls were admitted in the school and such school was recognised by the Travancore Government. It was upgraded to a high school in the year 1961-62 with the Standard IX and it became a completed High School during 1963-64 and temporary recognition has been granted to the school under the Madras Education Rules. Both boys and girls have been admitted in the school.

2. The admission of students in the various schools in the State of Tamil Nadu was being regulated by the Madras Education Rules. The Government of Tamil Nadu regulated the admission of girl students by issuing G.O. Ms. No. 1664, Education Department, dated 10th October, 1972 which runs as follows:

> "The Government direct that in areas where there are separate girls schools, girls should not, under any circumstances be admitted in boys' schools except with the specific and prior approval of the inspecting officers, and that too for valid reasons.
>
> The Government also agree with the views of the Director of School Education that this condition may also be imposed for granting recognition to Secondary Schools. The Director is requested to submit necessary draft amendments to the Tamil Nadu Educational Rules for the approval of the Government".

3. There is a girl school by name Samuel High School, Santhapuram, which is situate within 400 yards from the petitioner's school, namely, Dr. Samuel High School, Santhapuram, Kanyakumari District. The girls' school was a Tamil Medium School from 1926. In 1963, the school was upgraded into a girls' High School. The school is being managed by the C.S.I. Corporate Body, under the Kanyakumari District C.S.I. Diocese. In the locality, there are two schools. Inasmuch as by reason of the girl students being admitted into a boys' school like that of the petitioner, the petitioner was called upon to obey the terms of the G.O. Ms. No. 1664, Education Department dated 19th October, 1972 extracted above and by proceedings dated 18th June, 1975, the Director of School Education, Madras issued instructions to the District Educational Officer, Thuckalai that staff grant for Dr. Samuel High School, for the month of June, 1975 need not be released, since the management has violated the rules regarding the admission of girls in boys school during 1975-76 also. Therefore the petitioner has come up to this Court seeking for *certiorari* filed *mandamus* to quash the G.O. extracted above, and direct the respondent to forbear from interfering with the right of the petitioner in admitting girls in its school.

4. Mr. T. Martin, learned counsel for the petitioner submits first and foremost that it is a fundamental right of the petitioner school to admit girl students in its school and any restriction on such a fundamental right which is guaranteed under Article 30 of the Constitution, would be violative of the said Article and that therefore the impugned G.O. has to be struck down, in so far as it places a restriction, as violative of the said Article and has to be set aside.

5. In support of this, reliance is placed on *Director of School Education* v. *Rev. Brother C. Arogiaswamy*[1], *Rev. Br. A. Thomas* v. *Dy. Director of Schools*[2] and *St. Xavier's College* v. *State of Gujarat*[3]. Elaborating this point, the learned counsel for the petitioner contends that it is

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1. (1971) 1 M.L.J. 325: 84 L.W. 195: A.I.R. 1971 Mad. 440.

2. (1975) 1 M.L.J. 353: 88 L.W. 791: A.I.R. 1976 Mad. 214.

3. (1974) 2 S.C.J. 381: (1975) 1 S.C.R. 173: A.I.R. 1974 S.C. 1389.

not open to the Government, merely because they have the administrative control by means of a grant, to issue instructions to the schools as to whom they should admit.

6. The learned Government Pleader points out that it is a matter of policy in order that independent girls schools may come up. Therefore G.O. Ms. No. 1664, Educational, dated 19th October, 1972 is issued whereas in the instant case within 100 yards, another girls school is available which imparts education solely to girls, an impart of co-education may not be conducive and therefore the petitioner school was called upon not to admit girls. Notwithstanding this, there was complete disobedience of the same and therefore the District Educational Officer was directed by the Director of School Education not to release the staff grant for the Academic year 1975-76.

7. There cannot be any fundamental right with regard to admission of girls into a co-education institution. None of the rights of the petitioner is infringed. The petitioner school can still impart education to boys in whatever manner it pleases.

8. Mr. M. Raghavan, learned counsel appearing for the Girls' High School in supporting the submissions of the learned Government Pleader states that no fundamental right of the petitioner is hereby affected. If as a matter of policy, it is laid down that proper permission of the concerned educational authority should be obtained for admitting girls in a co-education institution, it will be purely regulatory in nature and such a regulation does not violate Article 30 of the Constitution. In fact an identical question arose before the Kerala High Court and the learned Judges of the Kerala High Court have held that there is no fundamental right involved since still it will be open to the petitioner to impart education to the boys as is seen from *Rt. Rev. M. S. G. R. Mark Netto* v. *Government of Kerala.*[1]

9. Mr. M. Martin, learned counsel for the petitioner in reply to this contention submits that the judgment of the Kerala High Court does not take note of the judgments of this Court reported in *C. Arogiaswamy's case*[1] and *A. Thomas's case*[2] and therefore it cannot be held as laying down the correct law.

10. Unaided by any of the authorities, first of all let me consider whether the petitioner can contend that he has a fundamental right to admit the girls in his school, merely because it happens to be a minority institution. Article 30 (1) of the Constitution states:

> "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice".

In the instant case, the right to establish the educational institution is not in any way interfered with. Nor again in my view, the administration is not interfered with because of the direction by the Government to the petitioner not to admit girls when an exclusive Girls' High School is available at a distance of 400 yards from the petitioner's school. Still the petitioner's right to impart education to boys is not in any way interfered with. Therefore it does not pertain to the realm of administration. Looked at from that point of view, no right of the petitioner has been violated.

11. A careful reading of G.O. Ms. No. 1664, Education, dated 19th October, 1972, extracted above clearly shows that it is merely regulatory in character since it says that in areas where they are separate girls schools, girls should not, under any circumstances be admitted in boys' schools except with the specific and prior approval of the inspecting officers and that too for valid reasons. It does not deny him the right, but merely requires the schools like the petitioner's to obtain prior approval. This may be a good-policy from the view of the Government. This Court cannot concern itself with the wisdom of such policy and hold that some rights of the petitioner have been infringed. However, I have

1. (1976) K.L.T. 312: A.I.R. 1977 Ker. 58.

1. (1971) 1 M.L.J. 325.
2. 88 L.W. 791: (1975) 1 M.L.J. 353.

already stated that no right has been infringed.

12. No let me turn to the case-law regarding the nature of the right conferred under Article 30 of the Constitution. In *St. Xaviers College* v. *State of Gujarat*,[1] Mathew, J., stated the law as under "Because Article 30 (1) is couched in absolute terms, it does not follow that the right guaranteed is not subject to regulatory laws which would not amount to its abridgment. It is a total misconception to say that because the right is couched in absolute terms, the exercise of the right cannot be regulated or that every regulation of that right would be an abridgment of the rights". Again in the *Kerala Education Bill's case*,[2] it has been held that Article 30 (1) gives two rights to the minorities (1) to establish and (2) to administer educational institutions of their choice. The right to administer cannot obviously include the right to maladminister. The minority cannot surely ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teachers matters subversive of the welfare of the scholars. It stands, to reason, then that the constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid, the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided.

13. *Director of School Education* v. *Rev. Brother G. Arogiaswamy*,[3] related to the admission of students according to their choice. A Division Bench of this Court in dealing with the same held:

> "In our opinion, it places serious restriction on the freedom of the minority institutions to make admissions of students accordng to their choice. It throws the students of the minority community into a competition with the generality of students belonging to that and all other communities. The applications for admission to any institution cannot be restricted to a particular community because of Articles 15 (1) and 29 (2). The result is the students of the Roman Catholic Community, which is said to represent less than 10% of the total population, when in competition with students of the other communities who have all applied for admission, obviously will have but slender chances of admission, contrary to the protection afforded by Article 30 (1). It is true the impugned order is conceived in public interest to ensure proper standards in the matter of admission to basic and non-basic training schools. That is good by itself. But when applied to a minority institution, its effect is not to its benefit from its own point of view. That is forbidden by Article 30 (1).

Again in *Rev. Br. A. Thomas* v. *Dy. Inspector of Schools*[1], while dealing with the right of a minority institution regarding the appointment of teachers, it was held:—

> "It will be an unreasonable interference to tell the institution that it could not employ a more highly qualified teacher in the interests of better students of education in its schools because it would not assist the scheme of the Government to find employment for higher grade teachers...... The Government cannot insist that a protected institution cannot take a more highly qualified teacher in the interests of higher standards of education in the institution. That will be an uncalled for, unreasonable and arbitrary interference with the management of the school. The aid given by the Government does not clothe the Government with any right to interfere with the freedom of management of the institution to employ teachers of their choice,

1. (1974) 2 S.C.J. 381: (1975) 1 S.C.R. 173: A.I.R. 1974 S.C. 1389.
2. 1959 S.C.J. 321: 1959 S.C.R. 995: A.I.R. 1958 S.C. 956.
3. 84 L.W. 195: (1971) 1 M.L.J. 325: A.I.R. 1971 Mad. 440.

1. (1975) 1 M.L.J. 353 : 88 L.W. 791.

who have a higher qualification than that prescribed by the Department".

Neither of these two decisions, in my view, affords any assistance to the petitioner since in those cases a right was held to have been established. That is not the position here, as I have held above, the more direct authority is what is found reported in *Mark Netto* v. *Government of Kerala*.[1] In that case, the Regional Deputy Director of Public Instruction, Trivandrum, by his order dated 5th June, 1973 refused permission to the petitioner to admit girls in his school which was a boys school. In dealing with the validity of that order, which was held under rule 12 of Kerala Education Rules, it was held:

> "This only says that girls may be admitted in secondary schools for boys in areas where there are no girls schools. It does not prohibit the minority community from giving education to their girls. It does not prevent them from admitting girls in girls' schools. It only prohibits admission of girls in secondary schools for boys if there is a girls' school in the same area. The basis of the rule seems to be that it will be better for the girls to get instruction in girls' schools as far as possible; and if there is a girls' school why the parents of the minority community should insist on admission of the girls in boys' school is ununderstandable. By the time the child reaches the secondary school stage it would have grown up a little. At that age to keep them under proper guidance and discipline the rule is made that they should as far as possible be given education in girls' school only. This is only in the nature of a regulation for discipline and morality. It does not interfere with the power of administration of an educational institution by a minority community. Therefore, we do not find any reason to hold that the rule in so far as it applies to religious minorities is invalid".

The reasoning of this decision squarely applied to the instant case. Consequently, I hold there are no merits in the writ petition. It will stand dismissed. No costs.

14. It is brought to my notice that during the pendency of the writ petition, students have been admitted and therefore at this stage, if they are directed to be sent out of the petitioner's institution, it will seriously interfere with their education and therefore it is appealed to me that my judgment may apply with regard to the future admission commencing from the next acadamic year. I see great justice in the appeal. Accordingly, my judgment will relate to admissions commencing from the academic year 1978-79.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Nestle's Products (India) Ltd. .. *Appellant**

v.

P. Thankaraja, Trading as Alvitone Laboratories and another .. *Respondents.*

Trade and Merchandise Marks Act (XLIII of 1958), section 9 (1) (c)—"Invented word"—Meaning—"INSTEA" whether invented word—Affidavits in inquiry regarding registration of trade marks—Value.

To be an "invented word" an expression must not only have been newly-coined; it must, standing by itself, convey no sense or meaning. It is, in any case, essential that the word must not give any inkling as to the type of goods to which the word relates, whether apparently or in a disguised form. The invention may be in the adoption of a foreign word; it may con-

1. 1976 K.L.T. 312: A.I.R. 1977 Ker. 58.

*C.M.P. No. 2948 of 1977. 29th April, 1977.

sist in an abbreviation; it may be an anagram; it may be formed out of a combination of two words, as they are, or in any clipped or altered form; it may introduce one or two meaningless syllables or letters in between words. Whatever be the mode of contrivance, if to the eye or to the ear the resultant expression conveys the same idea as would be conveyed by any recognizable expression in the common vocabulary, then the word would not be regarded by the trade mark law as an "invented word". In short, an invented word must be different from any word in common speech, and the difference must be substantial and not skin-deep merely. In judging whether a word is invented or not, in the sense aforesaid, the Registrar of Trade Marks and the Court must take in the word as a whole in order to form a totality of impression both of sight and of sound. Too minute an analysis of the word and its components can easily lead astray, get the subject out of focus and reduce the inquiry to a mere game or spelling-bee, an exercise which can have little or no relevance to the purpose of any statutory registration of trade marks. For gaining a correct impression about the trade mark as an invented word, it is permissible for the Registrar as well as the Court to rely on every material that is available to them, having relevance to the inquiry. It, however, seems that the matter will not get decided satisfactorily by merely consulting the dictionaries or drawing upon other people's reactions. It is essentially and ultimately for the Court to form a right impression about, bringing to bear its experience of life and language and trusting to its faculty of judgment. [*Para.* 11.]

In proceedings for registration of trade marks, affidavits are receivable in such inquiries not so much as evidence of what they speak about, but as providing information which may be found useful and relevant for rendering the Court's determination. The Evidence Act does not come into the discussion at all. [*Para.* 13.]

'INSTEA' is a fine example of a telescoped expression. The two words out of which the invention has been fashioned are quite ordinary words, and their connotations both in the market place as well as in the kitchen, are unmistakable. They denote the particular kind of readymade tea, which is so much ready made that people can make a drink out of it in a jiffy. There can be no mistaking about the character of the goods which is denoted by the expression "INSTEA" which is a condensation of the expression "instant tea". [*Para.* 16.]

Cases referred to:—

The Eastman Photographic Materials Company Ltd v. *The Comptroller-General of Patents, Designs and Trade Marks* (*Solio case*), (1898) A.C. 571; *Philippart* v. *William Whiteley Ltd.* (*Diabolo case*), (1908) 2 Ch. 274; *Hoffmann-La Roche and Co. Ltd.* v. *Geoffrey Manners and Co. (P.) Ltd.*, (1970) 2 S.C.R. 213: (1970) 2 S.C.J. 621: A.I.R. 1970 S.C. 2062; *De Cordova* v. *Vick Chemical Company*, (1961) 68 R.P.C. 103.

Appeal against the order of the Assistant Registrar of Trade Marks, Madras, dated 3rd March, 1976 and made in Opposition No. MAS 864 (Application No. 288956).

C.M.P. No. 2948 *of* 1977.—Petition presented to receive the publication of the *Times of India* dated 29th May, 1976, filed herewith as additional evidence in A.A.O. No. 367 of 1976.

P.K. Kurian for *King and Partridge*, for Appellant.

M.A. Rajagopalan, for Respondents.

The Court delivered the following

JUDGMENT.—In this appeal under section 109 of the Trade and Merchandise Marks Act, 1958, M/s. Nestle's Products (India) Limited object to the grant of registration to the trade mark "INSTEA' in favour of M/s. Alvitone Laboratories. Alvitone applied for registration of this trade mark under item No. 3 of the Fourth Schedule to the Trade Mark Rules 1959. which, *inter alia* included "tea". The application was made on the footing that the trade mark was "proposed to be used" by Alvitone. The Assistant Registrar accepted Alvitone's

application and granted registration to "INSTEA" (word *per se*) under Part A of the Register.

2. Nestles filed an opposition before the Assistant Registrar objecting to the grant of registration to Alvitone's trade mark. Nestles contended that "INSTEA" was not an invented word. According to them, it was easily recognizable as a *portmanteau* word to denote "instant tea", an expression descriptive of the character of the commodity in ordinary trade parlance. To grant registration for that word-mark in Alvitone's favour would, according to Nestles, tend to give monopoly advantages to Alvitone and rob others in the same line of trade of their right to employ the very same descriptive expression to denote their products. In support of their contentions, Nestles filed a number of affidavits from third parties who stated that Alvitone's trade mark immediately conveyed to them the suggestion that it related to instant tea.

3. The Assistant Registrar rejected all the grounds of objection put forward by Nestles. He held that "INSTEA" was eminently qualified for registration in Part-A of the Register under section 9 (1) (*c*) of the Trade and Merchandise Marks Act, 1958. He was of the view that it was an invented word. He relied on parallel cases in the books in which registration was granted to trade marks involving words similarly couched. He refuted the contention put forward by Nestles that the word INSTEA would not tend to embarrass either the trade in tea or the public which consumed it. He rejected the affidavits obtained by Nestles from third parties. He remarked that they were all in stereotyped form and came from the English educated elite who formed only a minority of tea drinkers. According to the Assistant Registrar, the mass of the people who consumed tea in the country were uneducated and they would not gain the impression that INSTEA stood for instant tea—an impression which could only be formed by an intelligent process of subjecting the word to fragmentation.

4. Mr. Kurian appearing for Nestle's in this appeal submitted that the Assistant Registrar's reasonings and findings were untenable. He said that the Assistant Registrar had not properly instructed himself in the law before proceeding to decide the question of registration in this case.

5. In the first place, Mr. Kurian submitted that "instea" is a combination of two concepts, "INSTEA" and "tea". The expression was not an invented word in the true sense. It was quite a common place *portmanteau* word obtained by clipping the latter part of the expression "instant" and joining what was left of it to the other expression "tea". Learned counsel pointed out that "INSTEA" must suggest to every one the idea of "instant tea". He explained that the word "instant" when used as an adjective, referred to anything which is made immediately soluble in water such, for instance, as instant coffee, instant tea, etc. According to him, instant tea which is the idea conveyed by the expression INSTEA, was a common trade description familiar to traders and consumers. The impression which this word created in the people's minds might tend to confuse them if the trade mark were used indiscriminately for all types of tea, such as green tea, blended tea, tea dust and instant tea. On the other hand, it may also deceive them if it was used for non-instant tea of every kind.

6. These submissions of Mr. Kurian were, however, vigorously countered by Mr. M.A. Rajagopalan, appearing for Alvitone Laooratories. He said that "INSTEA" was quite an invented word within the meaning of the statute. He accepted that the expression was capable of being sundered, with INS on the one side and TEA on the other. But he maintained that the word "INS" was by no means a conventional abbreviation of the expression "instant" or "instantaneous". He said that the abbreviation "ins" must mean many things to many men. It may mean "Insurance" or "Insured parcel". Quoting Webster, he gave further examples of what "ins" might stand for. He referred to "inscribed"; "inside"; "inspec-

ted"; "inspector"; "insular" etc. To this list, learned counsel added his own contribution, "insolvent". According to him, the usual and well-accepted shortened form for "instant" was not "ins", but "inst". If Alvitone really intended its trade mark to denote instant tea, the word, according to Mr. Rajagopalan, would have been "INST TEA" and not "INSTEA". He also hazarded the argument, addressed apparently for the first time in this appeal, that the *portmanteau* word "INSTEA" might well be regarded as a mis-spelling of the expression "INS TEA" meaning thereby 'tea served at inns'. Another argument inspired by the word combination and addressed by learned counsel, again, for the first time before me, was to the effect that INSTEA stood for "Alvins tea" *sans* the first three letters, "Alv".

7. In the course of their respective arguments, learned counsel on both sides cited, and made me read through, several reported cases both Indian and foreign on the question of what an 'invented word' is. In every one of those decisions, as I had occasion to observe, the discussion of this conception was clearly directed to the particular trade mark in question before the Court at the moment. I found it difficult to draw from them any synthesis of principle. Nor could I regard any of those cases as affording a parallel for the decision in this case. Nevertheless, a study of the law reports did help me form a clear idea in my own mind of the requirements of section 9 (1) (*c*) of our Trade and Merchandise Marks Act in relation to invented words.

8. Section 9 (1) (*c*) enacts that a trade mark shall not be registered in Part-A unless it contains one or more invented words. The Act provides no definition for what an "invented word" is. But this omission is compensated for by the discussion we find in one or two leading decisions. The view most often quoted in this connection is that of the House of Lords in the celebrated "*Solio Case*", *The Eastman Photographic Materials Company Limited* v. *The Comptroller General of Patents, Designs, and Trade marks*[1]. I quote the following observations of Lord Shand and Lord Herschell as laying down the proper guideline and approach as under: —

Lord Shand: "I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord Machaghten, in thinking, that the Comptroller-General will be fully warranted in taking care that there shall not be admitted, under the guise or cover of words called "invented" by the applicant, words really in ordinary use, which might, in a disguised form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word: and a word would not be "invented" which with some trifling addition or very trifling variation, still leaves the word one which is well-known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word".

Lord Herschell: —"I do not think that the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of any word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form".

9. Parker, J., in a subsequent case called the *Diabolo Case, Philippart* v. *William Whiteley Limited*[2], put the matter neatly in the following passage: —

1. 1898 A. C. 571.
2. (1908) 2 Ch. 274.

"To be an invented word within the meaning of the Act a word must not only by newly coined, in the sense of not being already current in the English language, but must be such as not to convey any meaning, or, at any rate, any obvious meaning, to ordinary Englishmen. It must be a word having no meaning or no obvious meaning until one has been assigned to it. I use the expression "obvious meaning" and refer to "ordinary Englishmen" because, to prevent a newly-coined word from being an invented word, it is not enough that it might suggest some meaning to a few scholars".

10. The two English cases from which I have quoted, have been adopted by Courts in our country for construing the expression "invented word" occurring in section 9 (1) (*c*) of our Trade and Merchandise Marks Act. In *Hoffmann, La Roche and Company Limited* v. *Geoffery, Manners and Company Private Limited*[1], the question arose before the Supreme Court as to whether "Dropovit" was or was not an invented word within the meaning of section 9 (1) (*c*) of the Act. In discussing the subject, the Supreme Court adopted the views expressed by Parker, J., in the *Diabolo Case*[2]. The Supreme Court referred, in passing, to the observation of Lord Radcliffe in *De Cordoya.* v. *Vick Chemical Company*[3] in which the noble Lord described the interpretation of Parker, J., as "the best standing definition of an invented word".

11. These decisions show that to be an invented word an expression must not only have been newly-coined; it must, standing by itself, convey no sense or meaning. It is, in any case, essential that the word must not give any inkling as to the type of goods to which the word relates, whether apparently or in a disguised form. The invention may be in the adoption of a foreign word; it may consist in an abbreviation; it may be an anagram; it may be formed out of a combination of two or more words, as they are, or in any clipped or altered form; it may introduce one or two meaningless syllables or letters in between words. Whatever be the mode of contrivance, if to the eye or to the ear the resultant expression conveys the same idea as would be conveyed by any recognizable expression in the common vocabulary, then the word would not be regarded by the trade mark law as an invented word. In short, an invented word must be different from any word in common speech, and the difference must be substantial and not skin-deep, merely. In judging whether a word is invented or not, in the sense aforesaid, the Registrar and the Court must take in the word as a whole in order to form a totality of impression both of sight and of sound. Too minute an analysis of the word and its components can easily lead us astray, get the subject out of focus and reduce the inquiry to a mere word-game or spelling-bee, an exercise which can have little or no relevance to the purpose of statutory registration of trade marks. For gaining a correct impression about the trade mark as an invented word it is, I think, permissible for the Registrar as well as the Court to rely on every material that is available to them, having relevance to the inquiry. It, however, seems to me that the matter will not get decided satisfactorily by merely consulting the dictionaries or drawing upon other people's reactions. It is essentially and ultimately for the Court to form a right impression about, bringing to bear its experience of life and language and trusting to its faculty of judgment.

12. As earlier mentioned, Nestles has brought on the record of this case a number of affidavits sworn to by individuals who are said to represent a cross-section of the public. All of them, to a man, have sworn that "INSTEA" at once brought to their mind to idea of instant tea. I do not think there is any reason to disbelieve their statements. The Assistant Registrar rejected the affidavits for another reason; he remarked that all of them said the same thing in the same words. He characterised the affidavits as stereo-

1. (1970) 2 S.C.R. 213: (1970) 2 S.C.J. 621: A.I.R. 1970 S.C. 2062.
2. (1908) 2 Ch. 274.
3. (1961) 68 R.P.C. 103,

typed. I do not, however, think this criticism, repeated before me by learned counsel for Alvitone, is to the point. The affidavits were quite obviously intended as so many samples of broad public reaction on the subject of the trade mark under inquiry. It was, accordingly, quite in keeping with this function that they should all have adopted some kind of *pro forma* language. In this sense I feel that they could not help being stereotyped. Indeed, they might have sounded quite artificial if each of them had striven for individuality of style.

13. Another contention put forward before me on these affidavits is that they do not constitute legal evidence and are not worth consideration. This objection, again, is based on a view of the trade mark law which, in my opinion, is not quite well-informed. The Trade Marks Act confers jurisdiction on the Registrar and the Court to render their determination in respect of various matters arising in proceedings taken under it. Registration of trade marks is one; action for infringement of trade marks is another; and so on. Cases in the books show that these proceedings have not to follow, as their model, the procedure prescribed for trial of suits before the law Courts. Even in actions for infringement, where there is clearly a *lis* between adversaries which the Court having jurisdiction has to adjudicate upon, decided authorities show that the evidence of witnesses can play only a subordinate rôle in the formation of the Court's final determination. For instance, a question that often arises in infringement cases is, whether a trade mark possesses deceptive similarity to a registered trade mark. There are high precedents for the view that the Court is not to be swayed by the testimony of witnesses for deciding whether the trade mark under dispute is deceptively similar. It is said that the Court should not surrender its prerogative and yield it to the opinions of witnesses. As has been observed, the real function of evidence of witnesses in such cases is to act as so many pieces of information which the Court may usefully refer to, for enabling it to arrive at the right conclusion. This position, which obtains in infringement proceedings, must equally apply, in my opinion, to proceedings for registration of trade marks. Affidavits are receivable in such inquiries not so much as evidence of what they speak about, but as providing information which may be found useful and relevant for rendering the Court's determination. In this view, the Evidence Act does not come into the discussion at all.

16. Mr. Rajagopalan characterized the affidavits as mere opinion evidence. I do not think this is quite an apt description, for they record the deponents' mental reactions to the trade mark, which are essentially to be regarded as states of mind. It is trite law that states of mind are states of facts, and, as facts, they are provable by evidence. Even otherwise, their relevance in the context of the inquiry before the Registrar and the Court cannot be gainsaid. All that can be urged is that the affidavits are not to be regarded as the last word on the subject of whether INSTEA or any other word mark is an invented word.

15. Mr. Rajagopalan urged one last argument on the subject of the affidavits. He said that they have all been obtained from persons knowing the English language. Their impressions about an invented word in that language cannot, it was urged, truly reflect the common reactions of ordinary men and women who gather around tea-shops, people who do not know English and whose reflexes are not English-oriented. I must say that this argument, if accepted, would shake the very linguistic foundations of our legal system. Whether we like it or not, English in our country is the language of the law. The Trade and Merchandise Marks Act is in English. The business of the Trade Marks Registry is transacted in English. The Court expresses itself in English. And so on and so forth. In this *milieu*, I cannot see how the fact that English is not the language of the people can be accepted as a sound argument for rejecting the affidavits.

16. I do not, therefore, reject the affidavits as of no importance. At the same time, I do not completely rely on them either. For I have to address

the crucial questions to myself in order to get the right answers. When the arguments opened and when, for the first time, I came across the expression "INSTEA",my first impression was that the word had something to do with tea and had something to do with instant. This first impression, I must confess, has outlasted all the learned arguments and explanations I happened to listen to subsequently in the course of the hearing of the appeal. It seemed to me that this is a fine example of a telescoped expression such as we find in "artsilk" for artificial silk, "Comintern" for communist international, and "Consambly" as a newspaper equivalent of constituent assembly One instantly assimilates these word-combinations and knows them for what they stand for even where they drop some vowels and consonants in between. It is the association of ideas that the word produces and which the inventor of the word aims at producing. I do not minimise the resourcefulness of the person who hit upon the expression INSTEA, but I have hardly any doubt about what he was driving at. The two words out of which he fashioned his invention are quite ordinary words, and their connotations, both in the market place as well as in the kitchen, are unmistakable. They denote the particular kind of ready-made tea, which is so much ready-made that people can make a drink out of it in a jiffy. In my opinion, there can be no mistaking about the character of the goods which is denoted by the expression "INSTEA" which is a condensation of the expression "instant tea".

17. The paramount consideration in a matter of this kind is not open to discussion. Whenever a trade mark offered for registration is claimed to be an invented word, registration of it can only be allowed if that word does not have the tendency to monopolise a part of the general vocabulary of the trade or restrict the use of words which traders in the line or elsewhere would be likely to need to describe their own goods. From this point of view, it seems to me that "INSTEA" has the tendency to monopolise all manufactured tea which goes by the generic description of 'instant tea' or 'instantaneous tea". To grant registartion to this word 'mark' would therefore make Alvitone as its owner a monopolist of the part of the ordinary vocabulary in which traders transact business with themselves and their customers.

18. Alvitone had claimed before the Assistant Registrar that it was not associating the mark "INSTEA" purely with reference to instant tea, but it wished to avail it for all kinds of tea and tea preparations. This was accepted by the Assistant Registrar. Mr. Kurian, learned counsel for Nestles, however, controverted this claim of Alvitone by reference to how that concern had since set about the job. Mr. Kurian sought to place before me an advertisement put forth by Alvitone and published in "The Times of India" bearing the date 29th May, 1976. The advertisement appeared after the grant of registration by the Assistant Registrar. The advertisement copy announced 'INSTEA" as "the first Indian instant soluble tea from the House of Alvitone". To this declaration was appended a catch-phrase or slogan: "Instea-The incredible instant tea". Learned counsel for Nestles filed an application in C.M.P.No. 2948 of 1977, in this regard requesting me to take in this advertisement as additional evidence in the appeal. The application was resisted by the learned counsel for the Alvitone. He said that the advertisement occurring, as it did, after the grant of registration after full inquiry, should not be admitted in evidence at this stage. I am not able to sustain this objection to the reception of this evidence. The rationale behind the provision giving the appellate Court a discretion in the matter of allowing additional evidence at the stage of the appeal is that such evidence was not available at the time of trial in the Court of first instance. Admittedly this advertisement was not there at the time when the Assistant Registrar had conducted the inquiry. In any case, the law allows an appellate Court to take note of subsequent events, especially when the appellate Court is convinced that such evidence is not only pertinent to the case, but will aid the decision in the appeal. I, accordingly allow C.M.P.No. 2948 of 1977.*

*Addl. Evidance marked in High Court as Ex. A-1.

19. The advertisement itself, in my view, is a clear demonstration of the earlier apprehension voiced by Nestles that "INSTEA" stands for instant tea. In the context of this advertisement, the original claim of Alvitone that the trade mark was asked for not merely for 'instant tea' but also for other varieties of tea, such as, 'green-tea', or 'black tea', etc., must lose its validity. Besides, in so far as the expression "INSTEA" is intended to refer to tea other than, 'instant tea', Alvitone must face the further criticism that, if so used, it is likely to mislead people into thinking that what is offered under this trade mark is 'instant tea' and not any other kind of tea.

20. As to the last proposition, Mr. Rajagopalan argued, as I have already mentioned, that this point had not been taken before the Assistant Registrar and even in the grounds of appeal. The argument is really based on section 11 which, it was pointed out, did not figure in the discussion before the Assistant Registrar. Mr. Kurian, however, referred to the counter statement filed by his client before the Assistant Registrar. In paragraph 4 of that statement or notice of opposition, Nestle's Products said that the granting of monopoly rights to the mark, "INSTEA" will embarrass the trade and the public in using the expression 'instant tea'. In the enquiry before the Registrar, it seems to have been argued that 'instea' is not adopted to distinguish the applicant's goods, as the word will be purely descriptive in respect of 'instant tea' while it will be deceptive in respect of any other tea. The contentions aforesaid are found narrated in the order of the Assistant Registrar, although he rejected them as untenable. Mr. Kurian submits that all that the pleadings and arguments before the Assistant Registrar lacked was a specific reference to section 11. This provision enacts that "a mark the use of which would be likely to deceive or cause confusion shall not be registered as a trade mark." It is the contention of Mr. Kurian that "INSTEA" is likely to dec ive or cause confusion if it is used for tea other than, "instant tea'. It is also likely to cause confusion if the same expression INSTEA were to be used for all kinds of manufactured tea whether green tea or black tea or dust tea or instant tea.

21. I do not propose to resolve this preliminary controversy between the parties on the contention based on section 11. The applicant may or may not have raised this plea in the first instance before the Assistant Registrar. In either case, there is scope for allowing the matter to be argued purely as a question of law on the basis of the materials on record. I, however, do not propose to enter into the discussion to find out how far section 11 can apply, in the view I have earlier taken as to the failure of the expression "INSTEA" to satisfy the test of its being an invented word under section 9 (1) (c) of the Act.

22. The result is that I allow the appeal and set aside the order of the Assistant Registrar granting registration. There will, however be no order as to costs.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman, J.*

The Savamalai Estates Limited .. *Appellant**

v.

P. M. Kannayan .. *Respondent.*

(A) *Contract Act (IX of 1872), section 56—Impossibility of performance of contract—Doctrine of frustration—If applicable to licences.*

(B) *Transfer of Property Act (IV of 1882)—Lease and licence—Distinction.*

(C) *Contract Act (IX of 1872), section 74—Penalty and liquidated damage distinguished.*

Lease of immovable property is a transfer of right to enjoy such property for certain period or in perpetuity in consideration of what is called rent. Th

* App. No. 472 of 1973.

15th December, 197

rent may be in cash or kind or in the shape of service or in the shape of any other thing for value. Just as in the case of a sale deed the destruction of the properties subsequent to the execution and registration of the sale deed would not avoid the transfer, similarly in the case of a lease there is a transfer of property on the execution of a document or at the commencement of the lease as contemplated by the parties. It is as much a concluded contract as a sale. There is nothing executory about the transfer. It is because of these considerations that Courts have not applied section 56 of the Contract Act to leases, though section 4 of the Transfer of Property Act provides that the chapters and sections of the act which related to contract should be taken as part of the Indian Contract Act. Whatever may be the position as regards leases, the distinction between lease and licence is quite well known. "Licence" is defined in section 52 of the Indian Easements Act of 1882 as a right to do or to continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right be unlawful and such right does not amount to an easement or an interest in the property. A lease on the other hand is a transfer of a right to enjoy an immoveable property and is thus an interest in the immoveable property. Therefore, what applies to a lease would not necessarily apply to a licence. The contract in the present case, is also executory in character because it contemplates an act being done in accordance with it in the shape of cutting of the timber and removal thereof. Therefore whatever applies to leases cannot *"ipso facto"* apply to a licence like this. Impossibility of performance within the time contemplated would attract section 56.

[*Para.* 7.]

Whether the terms of a contract contained any provision by way of penalty has to be determined on the terms of the contract. The parties to a contract may agree beforehand what sum shall be payable by way of damages in the event of breach, as for instance, it may be stated that a sum of Rs. 500 a day for every day of the building remaining unfinished after the contractual day for completion may be stipulated as payable by the contractor to the owner. The sum fixed in this manner falls into one of two classes. It may be a genuine pre-estimate of a loss that may be caused to one party if the contract is broken by the other. In such a case it is called 'liquidated damages' and it constitutes the amount, no more and no less, that the plaintiff is entitled to recover in the event of breach without being required to prove actual damage. In other words, the parties may have themselves assessed the damage at a particular figure. Secondly, it may be in the nature of threat held over the other party *in terrorem*, a security to the promisee that the contract will be performed. A sum of this nature is called a 'penalty' and it has long been subject to equitable jurisdiction. Courts of equity have taken the view, that since a penalty is defined as mere security for the performance of a contract, the promisee is sufficiently compensated by being indemnified for his actual loss, and that he acts unconscionably, if he demands a sum which though certainly fixed by agreement may well be disproportionate to the injury. The rule, therefore, is that the plaintiff who brings an action for the enforcement of a penalty can recover compensation only for the damage that he has in fact suffered. A penalty in other words covers but does not assess the damages. Section 74 of the Contract Act authorises the Court to award compensation not exceeding the amount of penalty stipulated for.

[*Para.* 10.]

Cases referred to:—

Satyabrata Ghose v. *Mugneeram Bangur and Company*, 1954 S.C.R. 310: (1954) 1 M.L.J. 41: 1954 S.C.J. 1: A.I.R. 1954 S.C. 44; *Raja Dhruya Dey Chand* v. *Harmohibinder Singh*, (1968) 3 S.C.R. 339: (1969) 1 S.C.J. 920: A.I.R. 1968 S.C. 1024; *Karnani Industrial Bank Ltd.* v. *Bengal Province*, A. I. R. 1949 Cal. 47; *Fateh Chand* v. *Balkrishnan Das*, (1964) 1 S.C.R. 515: (1964) 1 M.L.J. (S.C.) 60: (1964) 1 An.W.R. (S.C.) 60: (1964) 1 S.C.J. 187: A.I.R. 1963 S.C. 1405; *Maula Bux* v. *Union of India*, (1970) 1

S.C.R. 928: (1970) 2 M.L.J. (S.C.) 61: (1970) 2 S.C.J. 249: (1970) 2 An.W.R. (S.C.) 61: A.I.R. 1970 S.C. 1955.

Appeal against the decree of the Court of the II Additional Subordinate Judge, Coimbatore in Original Suit No. 519 of 1968.

N. S. Varadachari and *K. Ramachandran,* for Appellant.

R. Ganesan and *K. Ashokan,* for Respondent.

The Court delivered the following

JUDGMENT.—The defendant in O.S. No. 519 of 1968 in the Court of the Subordinate Judge of Coimbatore is the appellant. The plaintiff entered into an agreement with the defendant company at Coimbatore on 1st August, 1965 for clearing and uprooting all jungle and shade trees together with coffee stumps in 20 acres in plot No. 2 in Fields Nos. 5 and 6 of survey No. 39 in Manamboli Estate belonging to the defendant company. The value of the trees and the coffee stumps in their then existing condition was fixed at Rs. 300 per acre and the plaintiff paid the entire consideration of Rs. 6,000 for 20 acres. According to the agreement the plaintiff should on or before 15th September, 1965 clear and fell all standing trees together with the coffee stumps on the 20 acres. It was contemplated that the plaintiff should get the necessary permission from the concerned authorities for transporting and removing all the trees uprooted as expeditiously as possible. On receipt of such permission any timber or firewood remaining on the estate at the expiry of the validity of the permit granted by the Collector of Coimbatore would become the property of the estate. The plaintiff cleared and felled all the trees in the 20 acres and transported all the logs and firewood and charcoal from about 10 acres in time. The removal of the rest of the logs, firewood and charcoal could not be completed before the date of expiry of the Collector's permit, that is, 25th April, 1966 on account of various reasons. After 25th April, 1966 when the previous permit had expired, the defendant applied to the Collector for extension of time for transporting the timber, firewood etc., by a letter dated 12th May, 1966. By his proceedings dated 12th May, 1967 the Collector granted extension of time for three months from that date. The plaintiff came to know about the extension of time and requested the defendant's permission to remove the logs etc. The defendant stated in its letter dated 2nd August, 1967 that the plaintiff had no right over the timber and that he had committed a breach of the contract. The value of the timber etc., which had been left in the defendant's estate was estimated at Rs. 24,750 and after deducting the felling charges etc., the plaintiff claimed a sum of Rs. 14,750 as the loss of the timber, logs, charcoal etc., and in addition claimed to have paid Rs. 2,106 by way of seigniorage charges. Thus, the total amount claimed as due from the defendant was Rs. 16,856; as the defendant did not pay the said amount in response to a notice sent by the plaintiff on 11th June, 1968, the plaintiff came forward with the present suit for its recovery.

2. The defendant in its written statement contended that the Collector's permit expired on 25th April, 1966, that under the contract the timber etc., remaining in the land after that date became its property and that time was of the very essence of the contract. The defendant wanted the clearance for the purpose of replantation. According to the defendant, the plaintiff had ample opportunity to remove the timber, etc., and as he failed to do so, under the contract, the timber etc., became its properties. As the plaintiff had committed a breach, there was absolutely no cause of action as against the defendant.

3. The learned Subordinate Judge came to the conclusion that the contract, Exhibit A-1, embodied all the terms; that time was of the essence of the contract, that the non-removal of timber etc., was beyond the control of the plaintiff and that the timber etc., remaining on the land had not become the defendant's property. In the result, there was a decree for a sum of Rs. 6,000 with proportionate costs and subsequent interest.

It is this decree that is challenged by the defendant in the present appeal.

4. The learned counsel for the appellant contended that there was no hindrance to the plaintiffs' removing of the timber, etc., before the stipulated time and that the timber remaining on the land after the stipulated time had become the defendant's property. It was argued that the contract being in the nature of a licence stood on a par with a lease in respect of which the plea of impossibility of performance envisaged in section 56 would not apply and that, in any event, the result of the timber etc., becoming the property of the defendant after 25th April, 1966 could not be said to be a penalty, which could be relieved against. For the respondent the submission was that the correspondence emanating from the defendant itself would go to show that the plaintiff could not remove the logs because of non-availability of diesel oil and this is a case in which the plaintiff would be entitled to realise the value of the logs etc., left on the land.

5. The only question that arises out of the rival contentions summarised above is as to whether the plaintiff is entitled to the value of the logs etc., left on the land of the defendant. Exhibit A-1, which is the agreement dated 1st August, 1965 recites that the contract was entered into for the purpose of clearing off and uprooting all the trees inclusive of coffee stumps in the particular area on or before 15th September, 1965 to facilitate the company's re-planting programme. Clauses 1 and 2 of the agreement are as follows:—

"1. The contractor will on or before 15th September, 1963 clear and fell all the standing jungle and shade trees together with the coffee stumps on the 20 acres in field Nos. 5 and 6 in S. No. 39 demarcated as Plot 2 in the sketch map appended to this agreement.

2. The contractor will obtain all the necessary permission from the required authorities for transporting and removing from the company's estate all the timber, firewood and coffee stumps uprooted under this agreement as expeditiously as possible on receipt of such permission. Any timber or firewood remaining on the estate at the expiry of the validity of the permit granted by the Collector of Coimbatore will became the property of the estate".

It is unnecessary to refer to the other clauses in Exhibit A-1. It is in evidence that the defendant made an application to the District Collector on its own for permission to transport the timber etc., felled in this area. The first letter was addressed to the Collector on 10th May, 1965 (Exhibit A-2) and the second letter was on 26th May, 1965 (Exhibit A-3). On 26th July, 1965 the Collector gave the permission under Exhibit A-5 giving nine months' time for removal of the timber etc. This period of nine months would expire on 25th April, 1966. The procedure for removal of the logs has been described by the learned Subordinate Judge in paragraph 6 of his judgment. There is no dispute about the said description and it runs as follows:—

"The cut timber etc., has to be first measured. Then the necessary application has to be made to the (Forest) Range Officer. The Range Officer will come to the estate and then check the measurement. The Range Officer will also put a property mark by a hammer on every log of timber to be transported. Then he will issue a certificate. With that certificate, the person who wants to transport has to deposit the necessary seigniorage in the Forest Office. After depositing that fees on an application made, the Range Officer will issue the necessary passes in triplicate".

This procedure had been taken from what was spoken to by D.W. 1. As mentioned already, the permit in the present case had been obtained in the name of the defendant-company. It was therefore, necessary for plaintiff to take the rest of the steps only with the help of the defendant-company and the passes would also be issued only to the defendant company. The plaintiff had to obtain the initials of the Manager or

the head clerk of the defendant company and then use the lorries|asses for transporting the timber. The plaintiff's grievance was that on account of the unhelpful attitude of the then Manager it was difficult to get the forest passes in time. There were also difficulties in getting lorries for the transport of timber. As early as 3rd October, 1965 the plaintiff wrote in Exhibit A-10 to the defendant's manager mentioning various difficulties and had also offered to pay the lorry charges to the defendant if they would offer to give delivery of the consignments at the places where the plaintiff wanted them. In spite of the difficulties pointed out by the plaintiff, the defendant in Exhibit B-8 dated 19th February, 1966 pointed out that the progress in the transportation of the timber was slow and that the timber would become their property at the expiry of the permit period. On 12th May, 1966 the defendant itself wrote Exhibit B-14 in which it was mentioned as follows:—

> "Due to acute shortage of diesel oil and lack of transport facilities our contractor could not complete the removal in time. Hence we request you to kindly extend the time for another 3 months from the date of receipt of permission, so that we could transport the balance timber and firewood as early as possible and complete our replanting programme during this South West Monsoon".

Again on 11th February, 1967 in Exhibit B-15 the plaintiff repeated the shortage of diesel oil and lack of transport facilities as the reason why the contractor could not complete the removal of timber etc., in time and wanted extension of time for the removal of the logs etc. The acute shortage of diesel oil referred to in Exhibits B-14 and B-15 arose on account of the Indo-Pakistan war. It is thus an admitted fact that the plaintiff could not remove the logs for the reasons beyond his control. It is also clear from the correspondence with the Collector that subsequently the defendant obtained the necessary permit on the basis of such representations to the Collector about the acute shortage of diesel oil and lack of transport facilities to remove the logs. It is on these facts the question of rights of parties has to be determined.

6. If we take time as the essence of the contract, then as pointed out in Exhibits B-14 and B-15 it was impossible for the plaintiff to perform the contract in the manner contemplated by the parties. As pointed out by Mukherjea, J., in *Satyabrata Ghose v. Mugneeram Bangur and Company*[1], in deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act, taking the word "impossible" in its practical and not literal sense. It is in this context that the learned counsel for the appellant contended, that the provisions of section 56 embodying the rule of frustration as avoiding a contract would not apply to a licence, as it does not apply to a lease. The attempt was to equate a licence, with lease.

7. I shall first examine the question as to whether section 56 would apply to leases. This question directly arose in *Raja Dhruva Dey Chand v. Harmohibinder Singh and another*[2]. In that case there was a lease of five squares of land in the District of Montgomery in the undivided Punjab for two seasons in 1947-48. Following the partition of India in July, 1947 and allotment of the territory in which the lands were situate to Pakistan, the lessee migrated to India. He filed a suit for refund of the rent paid by him on the ground of impossibility of performance and the application of doctrine of frustration to the contract of lease. The Supreme Court held that where the property leased was not destroyed or rendered substantially and permanently unfit, the lessee cannot avoid the lease because he was unable to use the land for the purpose for which it was let to him. It was pointed out, that except in the manner contemplated in section 108 *(e)* of the Transfer of Property Act, the doctrine of frustration

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1. 1954 S.C.R. 310 at 322: (1954) I M.L.J. 41; 1954 S.C.J. 1: A.I.R. 1954 S.C. 44.

2. (1968) 3 S.C.R. 339: (1969) 1 S.C.J. 920: A.I.R. 1968 S.C. 1024.

would not apply to leases. The principle behind this proposition was explained by stating that there was a clear distinction between a complete conveyance and an executory contract and that events which discharged an executory contract did not invalidate a concluded transfer. A lease of an immovable property is a transfer of right to enjoy such property for a certain period or in perpetuity in consideration of what is called rent. The rent may be in cash or in kind or in the shape of service or any other thing of value. Just as in the case of a sale deed the destruction of the properties subsequent to the execution and registration of a sale deed would not avoid the transfer, similarly in the case of a lease, there is a transfer of property on the execution of the document or on the commencement of the lease as contemplated by the parties. It is as much a concluded contract as a sale. There is nothing executory about the transfer. It is because of these considerations that Courts have not applied section 56 of the Contract Act to leases, though section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which related to contracts should be taken as part of the Indian Contract Act. Whatever may by the position as regards the leases, this is a case of licence and the distinction between lease and licence is quite well-known. 'Licence' is defined in section 52 of the Indian Easements Act of 1882 as a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, he unlawful and *such right does not amount to an easement, or an interest in the property.* A lease, on the other hand, is a transfer of right to enjoy an immovable property and is thus an interest in immovable property. Therefore, what applies to a lease would not necessarily apply to a licence. The contract in the present case is also executory in character because it contemplates an act being done in accordance with it in the shape of cutting of the timber and removal thereof. Therefore, whatever applies to leases cannot *ipso facto* apply to a licence like this. The impossibility of performance within the time contemplated would attract section 56.

8. The next aspect to be considered is whether the clause providing for timber etc., becoming the property of the defendant if it was not removed before the expiry of the permit is a penal one so that Courts would have jurisdiction to mitigate it.

9. The learned counsel for the appellant relied on *Karnani Industrial Bank Limited* v. *Bengal Province*[1], as supporting his proposition that a clause like this vesting the timber etc., lying on the land in the owner, was nothing unusual and was valid. That was a case of a lease of brick fields for 10 years. There was a clause providing for the removal of the bricks and the other materials on the demised land before the expirty of the lease period or within three months thereafter by the lessee. The lessee in that case had on the land same boilers, engines, trucks, kilns, railway and tram lines which were useful in the manufacture and transport of bricks. On account of some breach of the terms of the lease, the owner of the land, the Government in that case, sued for ejectment and damages. The lessee contested the suit contending that the lease had not been validly terminated, that they were not required to remove the bricks and other items at the termination of the contract and that the said terms were illegal and penal. It was argued that the Government was not entitled to forfeit them. It is in this context that the question as to whether the forfeiture of those items amounted to a penalty came up for consideration. The Calcutta High Court held that the clause was not penal in character.

10. The decision as to whether the terms of a contract contained any provision by way of penalty has to be determined on the terms of the contract. The Supreme Court considered this question in two later decisions. The first of them is *Fatch Chand* v. *Balkishnan Das*[2].

1. A.I.R. 1949 Cal. 47.
2. (1964) 1 S.C.R. 515: (1964) 1 M.L.J. (S.C.) 60: (1964) 1 An.W.R. (S.C.) 60: (1964) I S.C.J. 187: A.I.R. 1963 S.C. 1405.

In that case under the agreement dated 21st March, 1949 there was a sale of leasehold rights in a piece of land and in the buildings constructed thereon to the defendant. The plaintiff received Rs. 25,000 under the agreement and delivered possession. However, the sale was not actually completed before the expiry of the period stipulated in the agreement, and the vendor instituted a suit claiming to forfeit the amount of Rs. 25,000 received by him and praying for a decree for possession of the land and building and also for compensation for use and occupation thereof. The defendant contended that the plaintiff had broken the contract and that the sum of Rs. 25,000 could not be forfeited. The Supreme Court held that there was a breach of the contract and that the vendor could forfeit only Rs. 1,000 received as the earnest money and was also entitled to compensation at the rate of Rs. 140 per month. In the course of the judgment at page 527 it was observed as follows:—

> "Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether section 74 applies to stipulations for forfeiture of amounts desposited or paid under the contract. It was urged that the section deals in terms with the right to *receive* from the party who has broken the contract reasonable compensation and not the right to *forfeit* what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression 'the contract contains any other stipulation by way of penalty' comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of the contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture".

Again at page 530 it was pointed out that section 74 merely declared the liability that notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court would award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of contract. In this context the loss sustained by the party affected by the breach had to be proved. In that case the Supreme Court remarked that there was no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by having been kept out of possession of the property. In *Maula Bux* v. *Union of India*[1], which was a case of sale of goods where certain money had been kept in deposit for due performance of the contract for supply of the goods and where the amount so deposited was sought to be forfeited, the Supreme Court pointed out at page 933 that forfeiture of earnest money under a contract for sale of property—movable or immovable—if the amount was reasonable, did not fall within section 74 and referred to several cases in this behalf and explained them as follows:—

> "These cases are easily explained, for forfeiture of a reasonable amount paid

1. (1970) 1 S.C.R. 928 : (1970) 2 M.L.J. (S.C.) 61 : (1970) 2 S.C.J. 249 : (1970) 2 An.W.R. (S.C.) 61 ; A.I.R. 1970 S.C. 1955.

as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of penalty".

In that case the Union Government which was the defendant sought to forfeit Rs. 18,500 out of which Rs. 10,000 related to supplies of potato and Rs., 8,500 to poultry contract. It was contended that these represented the estimate of damages which the Government was likely to suffer as a result of breach of contract and that the plaintiff was not entitled to any relief against forfeiture. Dealing with this aspect the Supreme Court observed at page 933 as follows:—

"Reliance in support of this contention was placed upon the expression (used in section 74 of the Contract Act) "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation'. It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression 'whether or not actual damages or loss is proved to have been caused thereby' is intended to cover different classes of contracts which come before the Courts. In the case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties, if it be regarded as the genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him".

The distinction between the penalty and liquidated damages has to be borne in mind. The parties to a contract may agree beforehand what sum shall be payable by way of damages in the event of breach, as, for instance it may be stated that a sum of Rs. 500 a day for every day of the building remaining unfinished after the contractual date for completion may be stipulated as payable by the contractor to the owner. The sum fixed in this manner falls into one of two classes. It may be a genuine pre-estimate of the loss that may be caused to one party if the contract is broken by the other. In such a case it is called "liquidated damages" and it constitutes the amount, no more and no less, that the plaintiff is entitled to recover in the event of breach without being required to prove actual damage. In other words, the parties may have themselves assessed the damage at a particular figure. Secondly it may be in the nature of a threat held over the other party *in terrorem*, a security to the promisee that the contract will be performed. A sum of this nature is called a penalty, and it has long been subject to equitable jurisdiction. Courts of equity have taken the view that, since a penalty is designed as mere security for the performance of the contract, the promisee is sufficiently compensated by being indemnified for his actual loss, and that he acts unconscionably if he demands a sum which, though certainly fixed by agreement, may well be disproportionate to the injury. The rule, therefore, is that the plaintiff who brings an action for the enforcement of a penalty can recover compensation only for the damage that he has in fact suffered. A penalty, in other words, covers but does not assess the damage. See Cheshire and Fifoot, the

Law of Contract, Seventh Edition, page 561.'

11. In the present case the value of the timber etc., sought to be forfeited has absolutely no relation to any damages that the defendant can be said to have suffered. It is in evidence that the plaintiff had stacked the timber, logs etc., in such a manner as not to affect the replantation activity. The replantation activity could not have been affected thereby. The defendant has not also proved any loss that it has sustained. The quantity of timber that may be left in the land is so uncertain in that it could have been considered to represent any measure of damages or compensation for any loss that may be sustained by the defendant. This is thus a clear case of penalty. Section 74 of the Contract Act authorises the Court to award compensation not exceeding the amount of the penalty stipulated for. As in this case there is no question of any compensation, as no loss is proved to have been suffered by the defendant, there is no scope or justification for granting any amount as damages. The result is that the defendant has to pay for the value of the timber etc., left in the defendant's land. There was no dispute about the valuation of the timber as such.

12. The appeal, therefore, fails and it is dismissed with costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*A. Varadarajan, J.*

K. Ramanujam Chettiar and others
.. *Petitioners**

v.

Arunachaleswarar Devasthanam by its Hereiditary Trustee T.M. Bageswara Mudaliar and another
.. *Respondents.*

Civil Procedure Code (V of 1908), section 115—Presidency Small Cause Courts Act (V of 1882), section 41—Ejectment suits—Eviction ordered—G.O.Ms. No. 1988, Home Department dated 12th August, 1974, applicable to the case—Revision against eviction orders—Small Cause Court, whether has jurisdiction—Question raised for the first time before High Court—Permissibility—Held on facts, that the Small Cause Court had jurisdiction.

In four ejectment suits filed by the respondent Devasthanam, the petitioners were ordered to be evicted. The petitioners challenged in revision the eviction orders made by the lower Court on the ground that it had no jurisdiction to entertain the ejectment suits under section 41 of the Presidency Small Cause Courts Act. The respondent contended that the point of jurisdiction was not raised before the lower Court and therefore the petitioners were precluded from raising the point in revision.

Held, the question of jurisdiction of the Court goes to the root of the matter and it is open to the petitioners to raise that question for the first time before the High Court in Civil Revision Petitions. [*Para.* 5.]

Rent is a term of contract of the lease. The respondent had alleged in the plaints in all the suits that the rent in the locality was, never less than one rupee per square foot. The petitioners could not ask the Court to ignore the actual rent paid by them in respect of the concerned properties, namely Rs. 15, Rs. 30, Rs. 100 and Rs. 70 respectively per

*C.R.P. Nos. 2102, 2123, 2125 and 2199 of 1976.
16*th August*, 1977.

mensem, and contend that the rack-rent exceeded Rs. 2,000 per annum on the respondent's own showing on the basis merely of the aforesaid allegations in the plaints for the gross rent on the basis of the rent which was being actually paid by the petitioners before the termination of their tenancies amounted to only Rs. 180, Rs. 360, Rs. 1,200 and Rs. 840 respectively per annum. The Court below had jurisdiction to entertain the ejectment suits. [*Para.* 8.]

Cases referred to :—

Kuppuswamy Chetty v. *Ayyammai Ammal*, A.I.R. 1935 Mad. 723; *National Coal Company Ltd.* v. *L. P. Dave*, A.I.R. 1956 Pat. 294; *Rajlakshmi Dasee* v. *Katyayani Dasee*, I.L.R. (1911) 38 Cal. 639; *The Digambar Parshwanth Jain Mandir* v. *Valubai*, A.I.R. 1961 Bom. 221; *Ganpat Pujari* v. *Kanaiyalla Marwari*, A.I.R. 1933 Pat. 246; *Connolly to Sheridan and Russell Ex parte*, (1900) 1 I.R. 1; *Lakshamshi Hirala and Co.* v. *Damji Khimji and Co.*, A.I.R. 1969 Bom. 73; *Rawlance* v. *Crevdon Corporation*, (1952) 2 Q.B. 803.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the Decrees of the Court of Small Causes (II Judge) Madras, dated 25th March, 1976 and made in E.S. Nos. 285, 280, 284 and 286 of 1975.

R. Nadanasabapathy, for Petitioners.

K. P. Unnikrishnan, for Respondent.

The Court delivered the following

JUDGMENT.—These civil revision petitions arise out of the judgments and decrees of the Second Judge, Court of Small Causes, Madras, passed on 25th March, 1976 in Ejectment Suits Nos. 285, 280, 284 and 286 of 1975.

2. The trial Court ordered eviction of the petitioners in these civil revision petitions holding that their old tenancy had been terminated and no new tenancy has come into existence thereafter, that there is no waiver of notice of the termination of tenancy by acceptance of any rent and that G.O.Ms. No. 1998, Home Department, dated 12th August, 1974, exempting properties belonging to temples from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, applies to the respondent-devasthanams.

3. The learned counsel for the petitioners canvassed before me only the question of the jurisdiction of the Small Cause Court, Madras, to entertain the ejectment suits under section 41 of the Presidency Small Cause Courts Act, 1882. It may be stated at this stage that no plea of want of jurisdiction of the Small Cause Court to entertain the suits had been taken in the written pleas filed by the petitioners in the ejectment suits and that the plea of want of jurisdiction of the lower Court was taken by the petitioners in the C.R.P. Nos. 2102, 2123 and 2125 of 1976 for the first time only in the memorandum of grounds of the civil revision petitions. The petitioner in C.R.P. No. 2199 of 1976 had not raised the plea of want of jurisdiction of the lower Court to entertain the suit even in the memorandum of grounds of civil revision petition. But he has been allowed to raise that plea by an additional ground as per order in C.R.P. No. 4657 of 1977 by this Court. The result is that the plea of want of jurisdiction of the lower Court to entertain the suits under section 41 of the Act has been taken for the first time only before this Court in these civil revision petitions. The suits are really applications for issue of summons to show cause why the persons concerned should not be compelled to deliver up the properties.

4. The learned counsel for the respondent-devasthanams contended before me that the plea of want of jurisdiction not having been taken before the lower Court should not be allowed to be raised for the first time before this Court in the revision petitions. But the objection does not appear, in my opinion, to be well founded. Pandrang Row, J., has observed in *Kuppuswamy Chetty* v. *Ayyammai Ammal*[1], that in the matter of pecuniary jurisdiction, the waiver of a party is not sufficient to clothe the Court with jurisdiction which it does not otherwise possess. A Bench of the Patna High Court has gone a step further in *National Coal Company Ltd.* v.

1. A.I.R. 1935 Mad. 723.

L. P. Dave and others[1]. The facts of that case disclose that the petitioner before the learned Judges submitted to the jurisdiction of the Tribunal below. It was, therefore, urged on behalf of the opposite party that the opposite party cannot raise the question of want of jurisdiction. On the other hand, it was contended on behalf of the petitioner before the learned Judges that the consent of parties cannot give jurisdiction to a Court or Tribunal if it had none. The learned Judges have observed that that proposition was undoubtedly true when there was inherent lack of jurisdiction in the Court or Tribunal. They have further observed that where the want of jurisdiction had to depend upon proof of certain facts and those facts had not been raised and proved, a party cannot be permitted to raise a plea of want of jurisdiction so as to render its decision void and ineffective. A Bench of the Calcutta High Court has observed in *Rajlakshmi Dasee* v. *Katyayani Dasee*[2], thus:

> "It is an elementary principle of law that, if the Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented......If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law. These principles apply, not only to Original Courts, but also to Courts of Appeal. Jurisdiction over the subject-matter, whether in the Court of first instance or in the Appellate Court, is given only by law, and cannot be conferred by consent of parties. Accordingly where an Appellate Court does not possess jurisdiction to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect of jurisdiction...These cases lay down the doctrine that, where no jurisdiction exists, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process. If a Court assumes to act where it has no jurisdiction, its adjudications are all utterly void and have no effect either as an estoppel or otherwise".

1. A.I.R. 1956 Pat. 294.
2. (1911) I.L.R. 38 Cal. 639.

Shah, J., of the Bombay High Court has observed in *The Digambar Parshwanth Jain Mandir* v. *Valubhai*[1], that even on general principles the point of jurisdiction, which goes to the root of the matter, can well be taken even in the highest Court of the land because it is the duty of the higher Courts to see that none of the subordinate Courts exercises jurisdiction which the Legislature has not thought fit to confer upon it.

5. The learned counsel for the petitioners submits that it is unnecessary to adduce any evidence for considering the question of want of jurisdiction of the trial Court to entertain the suits under section 41 of the Presidency Small Cause Courts Act and that a perusal of the claims in the ejectment suits alone would establish that the trial Court had no jurisdiction. In this connection reliance was placed on the decision of Kulwant Sahay, J., in *Ganpat Pujari* v. *Kanaiyalla Marwari*[2], where the learned Judge has observed that in order to determine the jurisdiction of the Court, the plaint and not the written statement should be looked into. In these circumstances, I agree with the counsel for the petitioners that the question of the jurisdiction of the Court goes to the root of the matter and that it is open to the petitioners to raise that question for the first time before this Court in these civil revision petitions.

6. The extent of property involved in C.R.P.No. 2123 of 1976(Ejectment Suit No.

1. A.I.R. 1961 Bom. 221.
2. A.I.R. 1933 Pat. 246.

280 of 1976) is 250 sq.ft. of land which had been admittedly let for a rent of Rs. 15 per mensem which works out to Rs. 180 per annum. The property involved in C.R.P. No. 2125 of 1976 (Ejectment Suit No. 284 of 1975) is 600 sq. ft. of land which had been admittedly let on a rent of Rs. 30 per mensem which works out to Rs. 360 per annum. The property involved in C.R.P. No. 2102 of 1976 (Ejectment Suit No. 285 of 1975) is about 4,370 sq. ft. of land which has been admittedly let for a rent of Rs. 100 per mensem which works out to Rs. 1,200 per annum. The property involved in C.R.P. No. 2199 of 1976 (Ejectment Suit No. 286 of 1975) is about 800 sq. ft. of land which had been admittedly let on a rent of Rs. 70 per mensem which works out to Rs. 840 per annum.

7. The respondent has alleged in the plaints in all the four Ejectment Suits that the rent in the locality is never less than Re. 1 per square foot. On the basis of this allegation in the plaints it was contended by the learned counsel for the petitioners that the rackrent of the aforesaid properties would be Rs. 3,000, Rs. 7,200, Rs. 52,440 and Rs. 9,600 per annum respectively. Section 41 of the Presidency Small Cause Court's Act, under which the Ejectment Suits have been filed, reads thus :

> " When any person has had possession of any immovable property situate within the local limits of the Small Cause Court's Jurisdiction and of which the annual value at a rack-rent does not exceed two thousand rupees, as the tenant, or by permission of another person, or of some person through whom such other person claims, and such tenancy or permission has determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses to deliver up such property in compliance with a request made to him in this behalf by such other person,
>
> Such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property."

The learned counsel for the petitioners, therefore, contended that on the respondent's own showing in the plaints, the rack-rent for the properties exceeds Rs. 2,000 per annum and that the lower Court, therefore, had no jurisdiction to entertain the suits under section 41 of the Act.

8. In Stroud's Judicial Dictionary (Third Edition) 'rack-rent' is defined thus:

> " 'Rack-rent', under Schedule I, Pt-II (first Scale) of the General Order under Solicitors Remuneration Act, 1881 means a rent which represents the full annual value of the holding."

Below that definition there is the passage reading thus :

> " When deciding whether a person receives a 'rack-rent' under section 9 (4) of the Housing Act, 1936, the effect of the Rent Restrictions Acts must be considered. "

In " Words and Phrases Legally Defined " (Second Edition) by John B. Saunders, it is stated :

> " A rack-rent in legal language means a rent that represents the full annual value of the holding. The fact that in addition to the rent reserved a substantial premium has been paid by the tenant is clear evidence that the rent is not a rack-rent.........
> " Rack-rent has been defined in 2 Blackstone's Commentaries, p. 43 as 'only a rent of the full value of the tenement or near it ; and in a judgment of Helmes, L.J., in *Ex parte Connolly to Sheridan and Russell*[1] is defined thus : 'a rack-rent in legal language means a rent that represents the full annual value of the holding.' "

In " 'The Law Lexicon of British India' by P. Ramanatha Aiyar it is stated : 'Rack-rent ' is only a rent of the full value of the tenement, or near it. It is rent of, or approaching to, the full annual value of the property out

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1. (1900) 1 I.R. 1.

of which it issues. Rent raised to the uttermost; the full annual value of the property. A term generally used to denote excessive rent."

In 'the Shorter Oxford English Dictionary' (Third Edition), rack-rent is stated to be:

"A very high, excessive, or extortionate rent; a rent equal or nearly equal to the full annual value of the land. Hence rack-rent (v. trans.) to subjct a person to the payment of rack-rent. Rack-renter, one who pays, or one who exacts rack-rent."

The meaning of "annual value" of rack-rent came up for consideration before the Bombay High Court in *Lakshmi Hirala and Co.* v. *Damji Khimji and Company*[1], where the learned Judge has extracted the following observations of Lord Justice Romer in *Rawlance* v. *Crevdon Corporation*[2], namely:

"In my opinion the legislature, in section 9 (of the Housing Act, 1936) was applying itself to a factual and not to a hypothetical position. If the standard rent is the greatest rent that is obtainable in respect of any particular premises then it is the full rent of those premises, the rack-rent, notwithstanding that (and indeed because) the owner is restricted from receiving the higher rent which the premises, if uncontrolled, would command and has proceeded to observe thus:

'This will indicate that the annual value at rack-rent is to be based on 'rent' even if the rent is controlled by legislature and not on licence fees. The rack-rent has to be 'rent' first before it becomes rack-rent. It can only mean gross rent and not net rent. In this particular case, the gross rent payable in respect of the premises by the petitioners as tenants to their own landlord who is the owner of the premises, is Rs. 2,256 per annum, and this is the annual value of the premises at a rack-rent. The amount of Rs. 3,120 per annum paid by the respondents to the petitioners as licence fees is neither rent nor rack-rent and cannot be the annual value at a rack-rent. In my opinion, the Bombay Small Cause Court had jurisdiction to entertain, try and determine the petitioners' application under section 41 of the Presidency Small Cause Courts Act in respect of the premises and it has failed to exercise jurisdiction vested in it".

This decision makes it clear that rack-rent has to be rent first before it will become rack-rent and that it could only mean gross rent and not net rent. The annual value at the rack-rent in section 41 of the Presidency Small Cause Courts Act as applicable to Bombay is Rs. 3,000, for the words "three thousad rupees", have been substituted in that section for the words "two thousand rupees" by Bombay Act XVI of 1958. The rack-rent in these cases cannot be said to be Rs. 3,000 Rs. 7,200 Rs. 52,440 and Rs. 600 respectively merely because the respondent devasthanams have alleged in the plaints that the rent in the locality is never less than Re. 1 per square foot. Rent is a term of contract of the lease. There is no agreement between the parties to pay rent at Re. 1 per square foot. The petitioners cannot ask the Court to ignore the actual rent paid by them, namely, Rs. 15, Rs. 30, Rs. 100 and Rs. 70 respectively per mensem, and contend the rack-rent exceeds Rs. 2,000 per annum on the basis merely of the aforesaid allegation in the plaints, for, the gross rent on the basis of the rent which was being actually paid by the petitioners, before the termination of their tenancies, amounted to only Rs. 180, Rs. 360, Rs. 1,200 and Rs. 840 respectively per annum. Therefore, I am of the opinion that the Court below had jurisdiction to entertain the ejectment suits.

9. The civil revision petitions are, therefore, dismissed with costs. Advocate's fee one set in C.R.P. Nos. 2102, 2123 of 1976.

S.J. — *Petitions dismissed.*

1. A.I.R. 1969 Bom. 73.
2. (1952) 2 Q.B. 803.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*S. Mohan, J.*

V. Sridhar, President, Sri Rao Bahadur Vemur Ranganathan Chetty Charities, Triplicane, Madras.

.. *Petitioner**

v.

The State of Tamil Nadu, represented by Secretary, Commercial Taxes and Religious Endowments Department, Fort St. George, Madras-9.

.. *Respondent.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959)—Charitable purpose — Meaning of—Running hostel for Hindu women—Provisions of the Act whether applicable.

Held: Running a hostel for Hindu women is undoubtedly a charitable purpose. Therefore the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act are applicable.

[*Para.* 6.]

Case referred to:—

Venkatarama Iyer v. *Government of Madras*, (1967) 80 L.W. 613.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in G.O. Ms. No. 1033, dated 22nd July, 1976 on the file of the respondent therein and quash the said order.

M. Subramanya Rao and *T. S. Ramu*, for Petitioner.

The Government Pleader, for Respondent.

The Court made the following

ORDER.—One Vemur Ranganathan Chetty of Triplicane left a will dated 30th January, 1949 bequeathing all his properties to be taken over after his lifetime by the executors who were also the trustees under a settlement deed dated 28th January, 1949 executed by him. Under the settlement deed he directed the members of the Governing Body of Sree Venkateswara Students Hostel, Triplicane, be appointed as trustees. He also directed the performance of certain charities and religious services mentioned therein. Clause 6 of the settlement deed directed that the trustees shall after the expiry of one year from the time of his death obtain vacant possession of premises No. 7, South Mada Street, Triplicane and Nos. 31 and 35, Thulasingaperumal Koil Lane, Triplicane, from the tenants and convert them into a hostel for women belonging to any of the four communities of Hindus provided they are vegetarians and on payment of reasonable occupational charges as in vogue in Sree Venkateswara Students Hostel, Triplicane.

2. Certain complaints were received that the hostel for women was not being maintained properly. After a formal enquiry by the Assistant Commissioner, Hindu Religious and Charitable Endowments, Madras the Government directed a full-fledged enquiry under section 3 (1) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as the Act) by its memorandum dated 4th January, 1973. The Commissioner, in turn, authorised the Assistant Commissioner, Madras to conduct the enquiry. This was duly notified to the trustees in office by memorandum, dated 10th February, 1973. The Assistant Commissioner enquired into the matter and submitted his report on 31st December, 1973. The Commissioner accordingly recommended to the Government the issue of a show-cause notice to extend the provisions of the Act on the following grounds:

"1. The trustees have not established a hostel for Hindu Vegetarian ladies in premises No. 7, South Mada Street, Triplicane after effecting necessary alterations and additions to Nos. 31, 31-35, T. P. Koil Street, Triplicane as desired by the donor;

* W.P. No. 165 of 1977. 21st March, 1977.

2. that the trustees have not taken any steps to evict the tenants from the premises Nos. 31-35, T. P. Koil Street, Triplicane, Madras-5 simultaneously with their action to vacate the lessee in premises No. 7, South Mada Street, Madras-5;

3. that no action has been taken to perform the charities like donation for the renovation of the temples, payments during Upanayanam and contributions to the charitable institutions and no steps have also been taken to invite applications for offering assistance for the above said charities;

4. that the construction of a prayer hall was made only during 1971-72 even though the trustees have entered into the management of the institution even prior to 1961;

5. and that the allocation of funds for the several charities is not done as per the percentage fixed by the donor and in respect of the charities not performed the funds for the same have not been set apart."

The Government accordingly issued a show cause notice on 1st June, 1974 and called upon the trustees why Vemur Ranganathan Chetty Charities should not be notified under section 3 of the Act. The trustees, through the President of the Board of Trustees made their representations, which were examined fully. The Government by G.O. No. 1033, Commercial Taxes and Religious Endowments, dated 22nd July, 1976 extended the provisions of the Act to the petitioner charity. It is to quash this order the present writ petition has been preferred.

3. The learned counsel for the petitioner urges two points in support of the writ petition. Firstly, it is not a charity within the meaning of the Act and secondly, the petitioner had no effective opportunity to put forth its case. The learned counsel relies on a decision of Ramakrishnan, J., reported in *Venkatarama Iyer* v. *Government of Madras*.[1]

1. (1967) 80 L.W. 613.

4. The learned Government Pleader draws my attention to clause 6 of the settlement deed and states that clause undoubtedly envisages a charitable purpose. His further submission is that it is not correct to say that there was no enquiry. On the contrary, in the enquiry conducted by the Assistant Commissioner, the petitioner did participate on more than one occasion. When the matter reached the stage of section 3 (3), a show cause notice was issued for which representations were also furnished by the petitioner charities. Therefore, the entire procedure has been properly followed and no objection could be taken to the same.

5. The decision cited by the petitioner has no application to the facts of this case, since that was a case wherein no enquiry whatsoever took place.

6. Clause 6 of the deed of settlement runs as follows:

"The trustees shall as soon as possible after the expiry of one year from the time of the death of the settlor obtain vacant possession of premises No. 7, South Mada Street, Triplicane, and Nos. 31-35, Thulasingaperumal Koil Lane, Triplicane, from the tenants and effect alterations and additions to the premises at a cost of about Rs. 5,000 converting door Nos. 31-35, Thulasingaperumal Koil Lane, Triplicane into kitchen and bath-room and establish in the said premises a hostel for the use of lady students belonging to any of the four communities of Hindus provided they are vegetarians of course on payment of reasonable occupational charges as in vogue in Sree Venkateswara Students' Hostel, Triplicane."

Running a hostel for Hindu women is undoubtedly a charitable purpose. Therefore, the provisions of the Act are certainly attracted. Hence the first contention of the petitioner fails.

7. Turning to the lack of opportunity I find on a perusal of the records produced before me that the petitioner did participate on 8th October, 1971 when the enquiry was conducted by the Assistant Commissioner. On these materials when the matter was forwarded to the

Government, the Government on being satisfied that the provisions of the Act should be extended, issued the show cause notice under section 3 (3) for which the petitioner did file its representations. Therefore, the entire procedure contemplated under section 3 of the Act has been fully followed. Section 3 (1) states as follows:

> "Where the Government have reason to believe that any Hindu or Jain public charitable endowment is being mismanaged, they may direct the Commissioner to inquire, or to cause an inquiry to be made by any officer authorised by him in this behalf, into the affairs of such charitable endowment, and to report to them whether, in the interest of the administration of such charitable endowment, it is necessary to extend thereto all or any of the provisions of this Act and of any rules made thereunder."

That enquiry in this case has been conducted by the Assistant Commissioner in which, as I said above, the petitioner did participate.

8. Section 3 (3) of the Act is to the following effect:

> "If, after considering the report of the Commissioner, submitted under sub-section (1), the Government are satisfied that such charitable endowment is being mismanaged and that, in the interests of the administration of such charitable endowment, it is necessary to extend thereto all or any of the provisions of this Act and of any rules made thereunder, they may, by notification, extend to such charitable endowment the said provisions, and thereupon, the provision as extended shall apply to such charitable endowment as if it were a specific endowment:

> Provided that before issuing such a notification, the Government shall publish in the Fort St. George Gazette, a notice of their intention to do so, specifying the reasons for the action proposed to be taken by them and fixing a period which shall not be less than two months from the date of publication of the notice, for the persons interested in the endowment concerned to show cause against the issue of the notification and consider their objections, if any."

In the instant case, after the materials were collected by the Assistant Commissioner, they were forwarded to the Commissioner who recommended the issue of the show cause notice on five grounds mentioned above. The Government was also satisfied about the desirability of extending the provisions of the Act and issued the show cause notice on 1st June, 1974 to which representations were filed through the President of the Board of Trustees. This was considered by the Government and then the ultimate order came to be passed. Therefore, there is absolutely no flaw in the procedure adopted.

9. *Venkatarama Iyer* v. *Government of Madras*[1] was a case in which no enquiry was conducted. Therefore, the case is distinguishable. However, in dealing with the scope of the section, the learned Judge (Ramakrishnan, J.) has made the following observations which are material for our purposes:

> "The language of section 3 of the Act makes it clear that after the report of the Inspector reaches the Government, the trustee will have an opportunity of showing cause; but it appears to me that, that opportunity will not be the same as an opportunity under section 3 (2) of facing a full and detailed enquiry. What is stated above is intended to lay stress on the importance of conducting the statutory enquiry under section 3 (2) with all the formalities that this section has prescribed."

As I have observed, the procedure indicated in the section has been properly followed in this case. Therefore the second contention of the petitioner also fails. Consequently I hold, this writ petition carries no merit and it is hereby dismissed. However, there will be no order as to costs.

R.S. *Petition dismissed.*

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1. (1967) 80 L.W. 613.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Sethuraman and V. Balasubrahmanyan, JJ.*

K. K. Jacob (Minor) represented by father and guardian M. K. Korah .. *Appellant**

v.

The Madurai University, represented by the Registrar, Madurai and another .. *Respondents.*

Madurai University Act (Madras Act XXXIII of 1965), section 35—Madurai University Rules—Student holding ICSE certificate admitted in P.U.C. Class—Admission cancelled after five months on the ground of his having only 35 per cent of marks in ICSE—University directed by High Court to permit the student to sit for the P.U.C. Examination—Candidate passing examination in second class—University not justified in cancelling admission after five months but ought to have exempted him—University directed to declare candidate as having passed P.U.C. examination and also issue a grade certificate—Estoppel doctrine applicable.

The Principal of a college would be the agent of the University. In the present case the candidate was not told early enough that his admission made by the Principal acting on behalf of the University was only provisional and was liable to be cancelled and had to be cancelled as it violated some rule, by-law or regulation. The silence and delay justify the invocation of the doctrine of estoppel. [*Para.* 10.]

In order to uphold a plea of estoppel, the Court should be satisfied that there was some detriment undergone as a result of the representation made by the particular authority. Even considered from this stand-point, on the facts it was clear that the petitioner had undergone some detriment. The petitioner had applied for admission to two institutions, one in Trivandrum affiliated to the Kerala University and the other in Nagercoil affiliated to the Madurai University. Having got admission first in the former college he joined there and paid the fees. Subsequently getting admission in the Nagercoil College he joined that college. The course he had taken in Trivandrum was only for about 2 years and he would have to study only for 2 years in degree course. By joining the shorter course the petitioner would have to study the degree course in Madurai University for a duration of three years. The total duration was four years in both cases. In the present case the petitioner did not derive any advantage by joining the short course and having paid his fees in the Trivandrum College and having foregone the fees on the basis of the admission given by the college at Nagercoil he had actually suffered detriment and the detriment required for the application of the rule of estoppel was present in this case.

[*Para.* 11.]

Cases referred to :—

The Registrar, University of Madras v. *Soundara Pandiyan*, (1956) 1 M.L.J. 25: I.L.R. (1956) Mad. 402: 69 L.W. 196: A.I.R. 1956 Mad. 309; *University of Delhi* v. *Ashok Kumar Chopra*, A.I.R. 1968 Delhi 131; *Assistant Custodian Evacuee Property* v. *Brij Kishore Agarwala*, (1975) 1 S.C.C. 21: (1975) 2 S.C.R. 359: A.I.R. 1974 S.C. 2325; *Robertson* v. *Minister of Pensions*, (1947) 1 K.B. 227; *Mowall* v. *Palmouth Boat Construction Co., Ltd.* (1951) *A.C.* 837; *Union of India* v. *M/s. Anglo Afghan, Agencies*, (1968) 2 S.C.R. 366: (1968) 2 S.C.J. 889: A.I.R. 1968 S.C. 718: *Century Spinning and Manufacturing Co., Ltd.* v. *The Ulhasnagar Municipal Council*, (1970) 2 S.C.J. 689: (1970) 3 S.C.R. 854: A.I.R. 1971 S.C. 1021.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice S. Mohan, dated 29th November, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 4440 of 1976 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the respondents to permit the petitioner to continue his studies in the Pre-University Course in the Scott Christian College

* W.A. No. 2 of 1977. 29*th July*, 1977.

Nagercoil, and complete the same and appear for the University Examination without reference to the letter of the 2nd respondent dated 3rd November, 1976.

M. Srinivasan and *K. Sreekumaran Nair*, for Appellant.

B. Ramamurthy, N. S. Varadachari and *T. V. Ramanujam*, for Respondents.

The Judgment of the Court was delivered by

Sethuraman, J.—This is an appeal from the judgment of Mohan, J., declining to admit Writ Petition No. 4440 of 1976. The petitioner was a student of Loyola School, Trivandrum and had appeared for an examination conducted by the Council for the Indian Schools Certificate Examination, New Delhi. In the said examination, the petitioner had obtained over 40 per cent. of marks in all subjects except Mathematics in which he had secured 35 per cent. The authorities conducting the said examination, issued a certificate to the petitioner stating that he had passed the said examination. The petitioner applied for admission to two institutions, namely, Mar Ivanias College, Trivandrum affiliated to the Kerala University and also to the Scott Christian College, Nagercoil affiliated to the Madurai University. He got admission first from the College at Trivandrum and he paid the sum of Rs. 75 for the first term fees. Subsequently, he got admission card from the Scott Christian College, Nagercoil. After getting a transfer certificate from the Mar Ivanias College, Trivandrum, the petitioner joined the Scott Christian College, said to be nearer his home, paying a sum of Rs. 200 towards fees etc. He joined the classes and was studying in the said college.

2. On 13th September, 1976 a form was taken from the petitioner in which the details relevant for submission to the Madurai University for recognition were recorded. The said form, as the form itself showed, had to be submitted through the Principal of the College where the applicant sought admission within 15 days of his admission with evidence of his having passed the examination sought to be recognised and other enclosures mentioned in the application. It is stated in the instructions appended to the said form that pending decision of the application the Principal may admit the applicant provisionally and at the applicant's risk. After more than a month following the submission of the said form to the Madurai University, the Controller of Examination, Madurai University sent a telegram on 25th October, 1976 to the Principal of the Scott Christian College, Nagercoil asking him to cancel the admission of the petitioner. The telegram was followed by a letter dated 29th October, 1976 from the Controller of Examinations to the Principal. In the said letter after mentioning that the petitioner had obtained only 35 per cent. in Mathematics as against 40 per cent required under the relevant rules and after referring to the earlier communications sent to the Principal, it was stated:

> "Even then you have admitted the candidate M.K. Jacob to P.U.C., who has not satisfied the above rule (*i.e.* he has secured only 35 per cent instead of securing 40 per cent. of marks in Mathematics). Hence I am by direction to request you to cancel the admission of the candidate M.K. Jacob to P.U.C. in your College during 1976-77 immediately under intimation to this office.
>
> I am also by direction to inform you that it is irregular on your part to admit candidate of this kind. You should avoid such irregularities in future."

On receipt of this letter, the Principal who is the second respondent in the Writ Petition sent a letter to the Controller of Examination stating that the admission of the petitioner to the Pre-University Class was cancelled. On the 3rd November, 1976, the petitioner's father received a letter conveying the cancellation of the admission. Immediately the petitioner's father made representations to the Vice-Chancellor of the Madurai University appealing to him to stay the operation of the cancella-

tion of the admission and permit his son to continue his studies pending a decision on the representation made to the Syndicate. The petitioner's father got a letter dated 7th December, 1976 in which it was stated that the rules of eligibility do not permit of any deviation. Apparently the authorities of the Madurai University had declined to consider the appeal made by the petitioner's father. The further representation also proved unsuccessful.

3. Thereafter the petitioner filed the writ petition in this Court for issue of a writ of *mandamus* directing the Madurai University and the Principal, Scott Christian College, Nagercoil, the first and second respondents to the petition to permit the petitioner to continue his studies in the Pre-University Course in the Scott Christian College, Nagercoil and to complete the same and appear for the University Examination. It is this writ petition which was dismissed *in limine* by Mohan, J. Against the said judgment, an appeal was preferred and after admission of the appeal, at the instance of this Court, the petitioner was granted the necessary card for appearing for the examination and he has passed the examination conducted by the Madurai University in the Pre-University Class in the second class. The writ appeal has now come before us for final disposal.

4. The learned counsel for the appellant submitted that the respondents were estopped from cancelling the admission which had been unconditionally given to the petitioner in June, July, 1976. For the first respondent the submission was that there cannot be an estoppel against statute and the authorities of the Madurai University had acted perfectly *bona fide* in cancelling the admission as the said admission was contrary to the relevant provisions of the rules governing the admission.

5. The only statutory provision which was relied on for this purpose by the counsel for the University is section 35 of the Madurai University Act (Madras Act XXXIII of 1965). That provision runs as follows:—

"*Admission to University Courses.*

(1) No person shall be admitted to the Pre-University Course or other entrance courses of study in the University unless he..

(*i*) has passed the Matriculation examination; or

(*ii*) holds the Secondary School Leaving Certificate and has been declared eligible by the Syndicate under conditions prescribed by the University authorities concerned for such course or courses of study; or

(*iii*) has passed an examination of any other University or authority recognised by the Syndicate as equivalent to the examination specified in Clause (*i*) or Clause (*ii*); and

(*iv*) fulfils such other conditions as may be prescribed by the Syndicate."

In the list of examinations recognised as equivalent to the Matriculation Examination for purposes of admission to the Pre-University Course is included the examination now under consideration, and it has been stated as follows:—

"The Indian Certificate of Secondary Education Examination (Class X) conducted by the Council for the Indian School Certificate Examination, New Delhi, is accepted as equivalent to the Matriculation Examination of this University subject to the condition that candidates should obtain 40 per cent. of the marks in the subjects of: (1) English language and Literature; (2) Mathematics or Modern Mathematics; (3) Science (*i.e.* Physics, Chemistry and Biology) and 35 per cent. in the other compulsory subjects and pass the whole examination at one sitting."

There is no dispute that in the present case the petitioner has passed the whole examination in one sitting. The only shortcoming pointed out by the University Authorities is that he had obtained only 35 per cent. in Mathematics as against the minimum of 40 per cent. required by the University. It is not in dispute that the regulations framed by

the University themselves contemplate the University Authorities granting exemption from the operation of the above rule in appropriate cases. It was in this context that during the pendency of the writ appeal the University Authorities were asked by us to review the cancellation of admission. On the ground that the Vice-Chancellor is away from the station, the University Authorities have stated that it was not possible to consider the application before the end of August, 1977. As the petitioner had already obtained an admission in another College at Nagercoil subject to his succeeding in the present proceedings and as the said seat was to be kept vacant only till 31st of July, 1977, the petitioner prayed that the writ appeal itself could be disposed of and that the matter cannot wait till the arrival of the Vice-Chancellor as it is not known whether the Authorities of the other college would keep the seat vacant till then. It is in these circumstances that we have to dispose of the writ appeal without waiting for the Authorities of the Madurai University to reconsider the case in the light of what had been stated in the course of the hearing of these proceedings on an earlier occasion. We are not happy over the attitude adopted by the Madurai University. On earlier occasion, when the matter came up before this Court, Ramaprasada Rao, J., sitting with Pandian, J., observed:—

> "After hearing the counsel and without prejudice to the contentions of both sides we are *prima facie* of the view that a candidate who was admitted by the University through its own officers and who stood the test of patience for one year and studies in one of the Colleges affiliated with the University and is appearing for the concerned examination should not now be told about the technicalities of law and the mistakes committed by its own officers so as to deprive the student of his legitimate year of education activity. It is for the University even now to consider whether it would not be equitable and in the interest of justice to regularise the admission as a special case."

It may be seen that the observations of Ramaprasada Rao, J., were made at a time when the petitioner had not appeared for the examination and the result was also not known. Now, after the petitioner has appeared for the examination and after he had passed in second class, the University Authorities are still taking their own time for the purpose considering whether the petitioner should be given exemption or not. It is not as if the power of exemption has not been exercised in appropriate cases. It is not clear as to why the authorities do not want to exercise the power of exemption in this case.

6. We shall first consider the question as to whether the petitioner was actually admitted without any condition, the word "provisionally" not being stated in the admission card issued to him, as contended by the counsel for the appellant. In other words, on behalf of the respondents, the submission made was that the petitioner had only been provisionally admitted. However, the learned counsel for the appellant submitted that the petitioner had been granted an unqualified admission and that the plea that there was a provisional admission is only an after-thought. As far as this aspect is concerned, it is difficult to decide the question without the counter-affidavit from the first and second respondents. Counter-affidavits were not filed as the writ petition was dismissed *in limine*. We do not therefore propose to enter into the question as to how and when certain endorsements of the admission being provisional were made in the application and admission card, but, however, we would prefer to rest our consideration on the basis of how the Controller of Examinations, the authority functioning under the Univesity has himself understood the nature of the admission in the present case. We have already extracted the relevant paragraph from the communication of the Controller of Examinations dated 23th October, 1976 sent to the Principal, Scott Christian College, Nagercoil. In the said letter it had been stated that the concerned respondent had admitted a candidate who had not satisfied the relevant rules. This sentence goes to show that the admission was unqualified and not provisional. If it was a qualified admission and only a provi-

sional admission, then the authorities would only have withdrawn the provisional admission. The fact that he had to cancel the admission clearly goes to show that the admission as originally made was not provisional. Further the petitioner could not be expected to have foregone a regular admission and joined an institution on the basis of a problematical and provisional one. The probalities do not support the University's contention. We are thus satisfied that there was a regular admission of the petitioner in the second respondent college. In fact any provisional admission would ordinarily be made only pending the consideration of the application to be made to the Madurai University for recognition of the individual cases. In other words, the procedure in such cases was stated to be as follows: Whenever a student had appeared for an examination conducted by any other University, other than the Madras, Madurai and Annamalai Universities, the College to which an application was made was to forward the application for consideration by the University so as to recognise his admission. In the present case, as mentioned already, the admission had been made before the 1st day of July, 1976 and the petitioner had paid his fees and had joined the classes on 1st of July, 1976. If any provisional admission had been made, then one would have expected the appropriate authorities to have taken immediately from him the requisite form for the purpose of recognition by the University authorities. This form, as mentioned already, had been taken from the petitioner only on the 13th of September, 1976. After the Principal forwarded this form, the University Authorities took more than a month for the purpose of considering the same and only after such a delay the University Authorities had chosen to cancel the admission given to the petitioner. These circumstances, in our opinion, go to show that the original admission was not a provisional one and that it was what can be called a pucca admission.

7. If the admission was a regular one as mentioned above, then the question that arises is whether the University Authorities had any power to cancel the said admission. The question as to whether the University Authorities, in similar cases, are estopped from cancelling the admission has been the subject of consideration in several decided cases. In *The Registrar, University of Madras* v. *Soundara Pandiyan and others*[1], the candidate who applied for admission to the University course had not actually been declared eligible for such course. He lacked even the basic qualification. However, in the S.S.L.C. book that was given to him there was an endorsement that he had been declared eligible. On the strength of that endorsement he sought and obtained admission in a College. Then the University Authorities discovered that there was a mistake in his admission and thereafter sought to cancel the said admission. It was the cancellation of the admission that brought the matter before this Court in a writ petition. Rajagopalan, J., who considered the writ petition made the rule absolute and ultimately an appeal was preferred by the University of Madras. The question that arose was whether the University was estopped from taking up the position that the particular candidate had been wrongly admitted for the university Course. In the following passage, the question of estoppel was considered by the Bench thus:

> "But he (counsel for the student) contended that in that particular case, having regard to what had happened, the University was estopped from saying that he could not continue his study and that he should leave the college. On the strength of a wrong endorsement made by the Secretary, Secondary Education Board acting presumably on behalf of the University, the petitioner had expended time and money in pursuing a course of study in the College for nearly two years. He should not now be told that there was a mis-

1. (1956) 1 M.L.J. 25: I.L.R. (1956) Mad. 402: 69 L.W. 196: A.I.R. 1956 Mad. 309.

take and all the two years of his study should go waste. We agree with him. We would prefer to rest our decision on this ground of equitable estoppel rather than on the ground of unreasonable exercise of power by the University, though ultimately the same result follows. Mr. Venkatasubramania Ayyar, met this plea of estoppel by the argumet that the University was not responsible for what the Principal had done. But this is no answer. What the petitioner relied on is the endorsement of eligibility on the S.S.L.C. book which must be deemed to have been made on behalf of the University as a result of which the petitioner undertook a course of study involving the expenditure of time and money. In our opinion, this in an instance of something much more substantial than what Mr. Venkatasubramania Ayyar, characterised as sentimental estoppel. It is a case of legal or equitable estoppel which satisfied practically all the conditions embodied in section 115 of the Evidence Act."

8. The learned counsel for the first respondent submitted that the main considerations which weighed with the Court in upholding the plea of estoppel in that case was that there was a delay of more than a year and in the present case there is no such delay. However, what has to be remembered is that the petitioner had joined a course of short duration, namely less than a year and he has prosecuted his studies for more than 4 or 5 months before he got the notice of cancellation from the University Authorities. Having regard to the duration of the course the delay was unreasonable. Therefore whatever considerations persuaded the learned Judges in *University of Madras* v. *V. Soundara Pandiyan*[1]; to uphold the plea of estoppel are present in the instant case.

9. The learned counsel for the first respondent submitted that the University Authorities cannot be made responsible for what had been done by the Principal in this particular case. The question as to whether any action of the Principal is binding on the University has been the subject of consideration by the Delhi High Court in *University of Delhi* v. *Ashok Kumar Chopra and another*[1]. In that case the candidate who joined the College had completed an examination conducted by the Gujarat Secondary School Certificate Examination Board, Baroda. He applied for admission in Deshbandhu College, New Delhi for studying in B.A. (Pass Course) of the University of Delhi. In this case also he lacked the basic qualification, as the said examination of Baroda had been recognised for admission into the College Course, and not for the degree course. The particular canditdate had pursued his studies for some time in the degree course and a similar procedure for cancellation of his admission was gone through in the said case also.

It was that which brought the matter before the Delhi High Court. It was pointed out at page 137:

> "Before discussing the decisions cited at the Bar. We may point out that there are two answers to the argument of Shri Avadh Behari that to these cases, the proposition that there can be no estoppel against a statute will apply. The first answer is, that as pointed out by the learned Judge (Tatachari, J., as he then was) in view of the provisions contained in Ordinance X-A any admission made contrary to the terms of clause 1 of Ordinance I cannot be considered to be an *ultra vires* act and therefore the proposition has no application. The second answer is that the doctrine will apply only with reference to the pleading of the University that it had not approved the provisional admission made by the Principals. The reason is that once the University has kept quiet and had not sent any intimation to the students

1. (1956) I M.L.J. 25: 69 L.W. 196: A.I.R. 1956 Mad. 309.

1. A.I.R. 1968 Delhi 131.

concerned that it had not confirmed the.........provisional admission made by the Principals of the Colleges that silence and inaction will amount to a representation that the University had approved the admission of the students concerned. It is the fact that the University had not approved the admission of the students in question that the University is estopped from denying".

Again at page 140 it was observed:—

"The position is that if the terms of a statute are absolute and do not admit of any relaxation or exemption, then anything done contrary to the terms of such a statute will be *ultra vires* and will be void and no person can be estopped from putting forward the contention that what he did was illegal or void. On the other hand, if a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises some body to exercise the power of exemption then anything done not in terms of those conditions or qualifications will not be *ultra vires* and will be said to be merely irregular and to such an act, the proposition that there can be no estoppel against the statute will have no application".

10. The above passage completely covers the contention that there can be no appeal against a statute raised on behalf of the University before us. At page 141 of the report, the question of agency has been considered and it was observed:

'When the applications were taken from the students by the Principals of the College for forwarding the same to the University, the Principals were acting as agents of the University and the Univesity all along knew that on the strength of the provisional admissions granted to them by the Principals, the students are continuing their studies in the college and if they are to be told that they were not eligible for admision they should be told so at an early time".

The Principal would thus be the agent of the University. We consider that in the present case the candidate has not been told early enough that the admission that had been made by the Principal acting on beālf of the University was only a provisional one and was liable to be cancelled and had to be cancelled as it violated some rule, bye-law or regulation. The silence and delay justify the invocation of the doctrine of estoppel.

11. The learned counsel for the first respondent submitted that the petitioner could not be said to have acted to his prejudice in the present case beause he had given up his studies in Trivandrum where he had to undergo a two year course while he could complete the Pre-University course which was one year. According to him by joining a shorter course he was not acting to his prejudice or detriment. The decided cases require that in order to uphold a plea of estoppel, the Court should be satisfied that there was some detriment undergone as a result of the representation made by the particular authority. Even considered from this standpoint, on the facts, here, we are satisfied that the petitioner had undergone some detriment. The course that the petitioner had taken in Trivandrum was for about 2 years and he would have had to study only for two years in the degree course. By joining the shorter course the petitioner would have to study the degree course in Madurai University for a duration of three years. The total duration was four years in both cases. In the present case the petitioner did not derive any advantage by joining the short course and having paid his fees in the Trivandrum College and having foregone the fees on the basis of the admission given by the Scott Christian College, he had actually suffered detriment and we are satisfied that the detriment required for the application of the rule of estoppel is present in this case.

12. The learned counsel for the first respondent drew our attention to certain decisions of the Supreme Court but they do not lay down anything contrary to the conclusion drawn by us. However, we may briefly notice one of these decisions,

namely *Assistant Custodian, Evacuee Property and others* v. *Brij Kishole Agarwala and others*[1]. In that case the wife of a Police Officer of the then United Provinces, was in Teheran in 1947 along with her husband. She migrated to Pakistan in 1948. In 1962 she came to India and sold the property which she had in Lucknow. Before the transaction the purchasers had enquired from the Assistant Custodian whether it was an evacuee property and had received a reply in the negative. The property was declared on 25th March, 1963 as evacuee property and on 7th March, 1964 the Notification was issued acquiring it under section 12 of the Displaced Persons (Compensation and Rehabilitation) Act. On the question whether there was estoppel operating, a Bench consisting of two learned Judges of the Supreme Court pointed out that the fact that the purchasers had made an enquiry and had been told that it was not an evacuee property did not make any difference and that the property was evacuee property. Before the Supreme Court, reliance had been placed on a decision of Lord Denning in *Robertson* v. *Minister of Pensions*[2]. In the case that was decided by the King's Bench the question was whether the Minister of Pensions was bound by the letter that had been issued by the War Office. In other words, the question was whether one Ministry was bound by a representation made by another Ministry. Lord Denning pointed out:

> "In my opinion if a Government Department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon having the authority which it assumes. He does not know, and cannot be expected to know the limits of its authority. The Department itself is clearly bound and as if it is but an agent for the Crown, it binds the Crown also and as the Crown is bound, so are the other departments for they also are but agents of the Crown. The War Office letter therefore binds the Crown, and through the Crown, it binds the Minister of Pensions".

1. (1975) 1 S.C.C. 21: (1975) 2 S.C.R. 359: A.I.R. 1974 S.C. 2325.
2. (1947) 1 K.B. 227.

These observations of Lord Denning were disapproved in a later decision of the House of Lords in *Mowall* v. *Palmouth Boat Construction Co., Ltd.*[1]. The Supreme Court considered that the observations of Lord Denning having been disapproved would not be relevant for consideration in the case before their Lordships. However, these very observations of Lord Denning had been accepted as laying down the correct law by a larger Bench of the Supreme Court on at least two earlier occasions and had become the law of the land. In *Union of India and others* v. *Messrs. Anglo Afghan Agenciese etc.*[2] The passage from Lord Denning's judgment was quoted with approval in dealing with a case of estoppel. Again in *Century Spinning and Manufacturing Co., Ltd. and another* v. *The Ulhasnagar Municipal Council and another*[3], the Supreme Court reiterated its approval of the passage from the judgment of Lord Denning. Thus the plea of estoppel is available against the Government and other authorities. In fact in the case last cited it was pointed out at page 1025:

> "If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

In the case of *Assistant Custodian, Evacuee Property and others* v. *Brij Kishore Agarwala and others*[4], these earlier decisions of the Supreme Court had not been brought to the notice of their Lordships. Therefore we consider that the plea of estoppel has to succeed as against the respondents. We consider that the writ petitioner having succeeded on the plea of estoppel

1. (1951) A.C. 837.
2. (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366: A.I.R. 1968 S.C. 718.
3. (1970) 2 S.C.J. 689: (1970) 3 S.C.R. 854: A.I.R. 1970 S.C. 1021.
4. (1975) 1 S.C.C. 21: (1975) 2 S.C.R. 359: A.I.R. 1974 S.C. 2325.

the cancellation of his admission has to be quashed and it is accordingly quashed. The appeal is allowed. Their will be no order as to costs.

R.S. — *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Balasubrahmanyan, J.*

Ponnuthayee Ammal .. *Appellant**

v.

Kamakshi Ammal .. *Respondent.*

Hindu Marriage Act (*XXV of* 1955), *sections* 5, 11 *and* 16—*Petition for declaration of nullity of marrige—Husband dead at the time of filing petition—Petition whether maintainable.*

Whether an application for nullity of marriage under the Hindu Marriage Act filed by a spouse for establishing the invalidity of the marriage for its own sake or for the collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that question it is not necessary that the other spouse should be living. [*Para.* 7.]

Cases referred to:—

Thulasi Ammal v. *Gowri Ammal*, (1964) 1 M.L.J. 228: I.L.R. (1964) 1 Mad. 65: 76 L.W. 505: A.I.R. 1964 Mad. 118; *Ramayammal* v. *Muthammal*, (1974) 2 M.L.J. 34: 87 L.W. 407: A.I.R. 1974 Mad. 321; *Gowri Ammal* v. *Thulasi Ammal*. (1962) 75 L.W. 559: A.I.R. 1962 Mad, 510.

Appeal against the order of the I st Additional District Judge, Madurai, dated 20th August, 1975 and made in C.M.A. No. 184 of 1974 (O.P. No. 36 of 1974, Sub-Court, Dindigul).

K. Sarvabhauman and *R. Nandakumar*, for Appellant.

R. Krishnamurthy, D. Raju and *A.R. Lakshmanan*, for Respondent.

* A.A.A.O. No. 91 of 1976.

22*nd March* 1977.

The Court made the following

ORDER.—This civil miscellaneous second appeal is brought before this Court by one Ponnuthayyee Ammal, widow of Veerabardra Pillai, in the following circumstances.

2. Veerabdra Pillai has a daughter by another wife. This daughter filed a suit for partition in O.S.No. 25 of 1969. In that suit Ponnuthayyee Ammal figured as a party. One of the issues in that suit was whether her marriage with Veerabadra Pillai was void, it having been contracted during the subsistence of an earlier marriage. The finding was that the marriage was void for that reason.

3. Ponnuthayee Ammal had children by Veerabadra Pillai. She was anxious to legitimize them. It was possible to obtain legistimization only if her marriage with Veerabadra Pillai were declared a nullity under the Hindu Marriage Act, 1955. The finding in a collateral suit would not avail the children.

4. It is in these circumstaces that Ponnuthayee filed an independent proceeding O.P. No. 36 of 1974 under sections 5 (1), 11 and 16 of the Hindu Marriage Act, 1955 for a decree of nullity of marriage on the basis that her husband had contracted the marriage with the petitioner during the subsistence of an earlier marriage. At the time this petition was filed the husband was dead and gone. She however impleaded the daughter by the first wife as the defendant. The learned Subordinate Judge went into the merits of the petition, and, allowing the petition, granted a decree for nullity. He rejected the contention raised by the respondent that a petition for nullity by the wife is not maintainable over the dead body of the husband and that an application under section 15 of the Hindu Marriage Act, can only be maintained as against a husband living. The learned Judge rejected this contention relying upon certain observations of a Division Bench of this Court consisting of Srinivasan and Venkatadri, JJ., in *Thulasi Ammal* v. *Gowri Ammal*[1].

1. (1964) 1 M.L.J. 228: I.L.R. (1964) 1 Mad. 65 : 76 L.W. 505: A.I.R. 1964 Mad. 118.

5. Against the decision of the learned Subordinate Judge, the respondent filed an appeal on the one and only ground that the petition for nullity was not maintainable having been filed by the wife after the death of the husband. The learned Additional District Judge, Madurai, accepted the contention put forward by the respondent and allowed the appeal and set aside the decree for nullity granted by the learned Subordinate Judge of Dindigul. The learned Additional District Judge seems to have regarded the observations made by Srinivasan and Venkatadri, JJ. in *Thulasi Ammal* v. *Gowri Ammal*[1], as in the nature of *obiter dicta*. Relying on certain other decisions of this Court rendered by learned single Judges, the learned Additional District Judge held that an application by a spouse for declaring the marriage null and void would not lie unless it was filed during the lifetime of the other spouse. The decision of the learned District Judge is now questioned in this civil miscellaneous second appeal.

6. The matter indeed has now become academic by reason of the amendment made to the Hindu Marriage Act in section 16. Section 16 has been newly amended by section 11 of the Central Act LXVIII of 1976. Under the section, as amended it is declared that notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and *whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*

7. It will be seen that under the amended section any child of a void marriage shall be legitimate notwithstanding the fact that a decree or nullity has not been granted in respect of that marriage under the Hindu Marriage Act, 1955. It is further provided under the amended section that the children of void marriages shall be regarded as legitimate whether such children had been borne *before or after the amendment of* section 16 under the Marriage Laws (Amendment) Act, 1976. In these circumstances, the filing of the Original Petition No. 36 of 1974 itself would now seem, in retrospect, to be an exercise in superfluity. This amendment has rendered the technical issue raised as to the maintainability of the O.P. as a purely academic question. Nevertheless, I think I must go into the question to give this appeal a proper disposal. I must say that I do not agree with the views expressed by the learned Additional District Judge as to the maintainability of a petition filed by a spouse for declaring a marriage null and void after the death of the other spouse. As has been pointed out by Srinivasan and Venkatadri, JJ., in *Thulasi Ammal* v. *Gowri Ammal*[1], it seems to me that whether the application for nullity is filed by the spouse for establishing the invalidity of the marriage for its own sake or for the collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that question it is not necessary that the other spouse should be living. This was so held by Srinivasan, J. and with respect, I agree with that opinion.

8. With respect, I do not share the views of Ramanujam, J., in *Ramayammal* v. *Muthammal*[2], and also an earlier decision of Ramakrishnan, J., in *Gowri Ammal* v. *Thulasi Ammal*[3]. In the result, I allow this civil miscellaneous second appeal, but in the circumstances, without costs.

S.J. —— *Appeal allowed.*

1. (1964) 1 M.L.J. 228: I.L.R. (1964) 1 Mad. 65: 76 L.W. 505: A.I.R. 1964 Mad. 118.

1. (1964) 1 M.L.J. 228: I.L.R. (1964) 1 Mad. 65: 76 L.W. 505: A.I.R. 1964 Mad. 118.
2. (1974) 2 M.L.J. 34: 87 L.W. 407: A.I.R. 1974 Mad. 321.
3. (1962) 75 L.W. 559: A.I.R. 1962 Mad. 510.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—*A. L. Koshal, J.*

Nagammal .. *Petitioner**

v.

The State of Tamil Nadu, represented by Secretary to Government, Housing Department, Fort St.George, Madras-9 and another .. *Respondents.*

Land Acquisition Act (*I of* 1894), *section* 4 (1)—*Notification published in Official Gazette on 3rd October*, 1973—*Public notice of substance of notification given by Collector* 22 *days later in the locality—Procedure illegal—Constitution of India* (1950), *Article* 226.

Where notice of the substance of the notification relating to a proposed acquisition of land was given by the Collector in the locality not less than 22 days after the publication of the notification under section 4 (1) of the Land Acquisition Act such notice and notification not being simultaneous, are vitiated. [*Para.* 3.]

The impugned notification and the proceedings held in pursuance of it were liable to be quashed. [*Para.* 5.]

Cases referred to:—

State of Mysore v. *Abdul Rasak*, (1973) 3 S.C.C. 196: (1974) 1 S.C.J. 492: A.I.R. 1973 S.C. 2361; *Narinderjit Singh* v. *State of U.P.*, (1973) 1 S.C.C. 157: (1973) 2 S.C.J. 378: A.I.R. 1973 S.C. 552; *Rattan Singh* v. *State*, A.I.R. 1976 P. & H. 279.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in G.O.R. No. 497, Housing, dated 17th September, 1973 published by the 1st respondent at page 6 of the Supplement to Part II, section 1 of the Tamil Nadu Government Gazette dated 3rd October, 1973 and quash the same.

*W.P. No. 6322 of 1973. 2nd November, 1976.

K. R. Natarajan, for Petitioner.

C. Chinnaswamy, for Government Pleader on behalf of Respondents.

The Court made the following

ORDER.—In this petition under Article 226 of the Constitution of India the challenge is to the acquisition proceedings taken in respect of the land of the petitioner who prays that the same be quashed along with the relevant notification under sub-section (1) of section 4 of the Land Acquisition Act (hereinafter referred to as the Act) which is claimed to be of no legal effect whatever for the reason that it was not accompanied or immediately followed by a public notice of its substance as envisaged by that sub-section.

2. The said notification was published in the Official Gazette on the 3rd of October, 1973 and the Collector caused public notice of the substance thereof to be given at convenient places in the locality in which the land in dispute is situated on the 25th of October, 1973. Although the case put forward in the petition is that no such notice was given, the contention raised on behalf of the petitioner at the hearing is that the notification was invalid by reason of the notice having been given no earlier than 22 days after its publication. This contention must be accepted in view of the dicta of their Lordships of the Supreme Court in *State of Mysore* v. *Abdul Rasak*[1] and *Narinderjit Singh* v. *State of Uttar Pradesh*[2]. In the first of those cases no notices as required by section 4 (1) of the Act were published in the locality till after a lapse of about ten weeks. In striking down the notification as illegal their Lordships observed:

"Under certain circumstances publications in the Official Gazettes are presumed to be notice to all concerned. But in the case of a notification under section 4 of the Land Acquisition Act the law has prescribed that in addition to the publication of the notification

1. (1973) 3 S.C.C. 196 : (1974) 1 S.C.J. 492 : A.I.R. 1973 S.C. 2361.
2. (1973) 1 S.C.C. 157 : (1973) 2 S.C.J. 378 : A.I.R. 1973 S.C. 552.

in the Official Gazette the Collector must also give publicity of the substance of the notification in the concerned locality. Unless both these conditions are satisfied, section 4 of the Land Acquisition Act cannot be said to have been complied with. The publication of the notice in the locality is a mandatory requirement. It has an important purpose behind it. In the absence of such publication the interested persons may not be able to file their objections about the acquisition proceedings and they will be deprived of the right of representation provided under section 5-A which is a very valuable right."

In *Narinderjit Singh's case*[1], the provisions of section 5-A of the Act were dispensed with under section 17 (4) thereof and it was urged on behalf of the State of Uttar Pradesh which had acquired the land in dispute that *Abdul Razak's case*[2], was distinguishable. The contention was overruled on the ground that section 4 (1) did not contemplate any distinction between those proceedings in which in exercise of the power under section 17 (4) the appropriate Government directs that the provisions of section 5-A shall not apply and where such a direction has not been made dispensing with the applicability of section 5-A. The provisions of section 4 (1), in the opinion of their Lordships, were mandatory in either case and laid down in unequivocal clear terms that both things, *viz.*, the publication of a notification in the Official Gazette and notice of the substance thereof at convenient places in the locality have to be done simultaneously.

2-A. The two cases above cited were allowed by a Full Bench in *Ratan Singh* v. *State*[3], in which the notice of the substance of the notification was given on the 29th day of the publication of the notification itself which was quashed. It was urged before the Full Bench on behalf of the concerned State, that if the notice of the substance of the notification was delayed, the notification itself did not become illegal, but that the only effect of the delayed notice would be to give to the owners of the land sought to be acquired a right to file their objections within 30 days of such notice. The contention was repelled, and in my opinion rightly because it runs counter to the dictum of their Lordships of the Supreme Court in *Abdul Razak's case*[1], wherein as already stated, notice of the substance of the notification was given in the locality about ten weeks after the publication of the notification which was struck down as being illegal by reason of the delay in giving the notice. If the only effect of such delay is that the period of 30 days mentioned in section 5-A commences when the notice is given, then there was no impediment in the way of this principle being applied to the facts of *Abdul Razak's case*[1], and their Lordships holding that while the notification itself was not illegal, the effect of the delay in giving the notice of the substance thereof in the locality was that the period of 30 days for filing objections would commence with the date when such notice was given. That it was not so held clearly means the repudiation by their Lordships of the principle enunciated on behalf of the State.

3. In the present case, notice of the substance of the notification was caused by the Collector to be given in the locality not less than 22 days after the publication of the notification itself. The notice and the notification are therefore not simultaneous. In fact, the notice cannot even be said to have followed the publication of the notification shortly afterwards. In this situation, I regard the notification as falling squarely within the ambit of the dictum in *Abdul Razak's case*[1].

4. Before parting with the judgment I may notice a contention raised on behalf of the State to the effect that the petitioner should not be allowed to raise the question of illegality of the notice because he did not do so in the petition. The question raised is a pure question of law in

1. (1973) 1 S.C.C. 157 : (1973) 2 S.C.J. 378 : A.I.R. 1973 S.C. 552.
2. (1974) 1 S.C.J. 492 : (1973) 3 S.C.C. 196 : A.I.R. 1973 S.C. 2361.
3. A.I.R. 1976 P. and H. 279.

1. (1973) 3 S.C.C. 196 : (1974) 1 S.C.J. 492 : A.I.R. 1973 S.C. 2361.

view of the facts admitted at the hearing and there is no real impediment in the way of permission being granted to the petitioner to raise it at this stage. Besides, the petitioner can well take the stand that the notice given by the Collector in the locality not having followed the notification immediately after its publication it is no notice in the eye of law so that his averment in the petition that no notice had at all been given is really not incorrect from the legal point of view. In this view of the matter, I regard the contention to be without force.

5. In the result, the petition succeeds and is accepted and the impugned notification and the proceedings held in pursuance of it are quashed. The parties are however left to bear their own costs.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

R. Srinivasan .. *Appellant**

v.

S. P. Krishnamoorthy Sarma and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Trust—Idol of Sri Ramachandramoorthi installed in a village—Trust created by a deed of endowment and provision made for management of the trust —Death of founder—Subsequent trustee alienating trust property and purchasing building in another village and removing the picture of "Sri Ramachandramoorthi" to the new place—Plaintiff, grandson of the founder, challenging the alienation—Suit maintainable—Alienation not binding on the trust.

One *S* purchased a small piece of land in village *R*, put up a building—a *madam* and installed in it the picture of "*Sri Ramachandramoorthi*" and was performing pooja. Later, by a deed of endowment dated 4th September, 1904, he constituted this into a trust where the Hindu community in that village worshipped. The deed provided for trustees and the management of the trust properties. After the death of *S*, *P* became the trustee. *P* and his son alienated the trust properties and with the consideration purchased another building in another village *K* and removed the picture of Sri Ramachandramoorthy to the village *K*. The plaintiff a grandson of the founder *S*, filed a suit challenging the alienation of the trust properties. The defendants raised the plea that the suit was not maintainable on the ground that the plaintiff was neither a trustee nor one entitled to become a trustee. Further the defendants also contended that the shifting was done since the locality in village *R* become predominantly a Muslim locality. The trial Court dismissed the suit and this was confirmed by the lower appellate Court. The plaintiff preferred a Second Appeal.

Held: The decision of the Supreme Court in *Bishwanath and another* v. *Sri Thakur Radha Ballabhji and others*, (1967) 2 S.C.J. 331: A.I.R. 1967 S.C. 1044 and the decision of the Madras High Court in *Manikkanarasimhachari* v. *Ramasubbier and others*, (1970) 1 M.L.J. 337: 82 L.W. 677, showed that the plaintiff, as a person interested in the trust, though he might not have been residing in the village where the *madam* was situate, was entitled to maintain the suit. [*Para.* 4.]

None of the witnesses had spoken about any intereference to the proper functioning of the *madam* by any of the Muslims in the locality. The lower appellate Court had assumed that the entire population in the village had become Muslims except two Brahmin families. The fact that in the street in which there was the *madam* there were Muslims would not by itself show that the *madam* could not be utilised as a place of worship for the purpose of *bajanai* or other festivals. The assumption of the lower appellate Court that the entire village had become a Muslim-populated place, was not supported by any evidence. The finding that the trustees were within their rights in shifting the place of worship to *K* from *R* was, therefore, on the wrong assumption that there were no Hindus except two Brahmin families in *R* village. The

*S.A. No. 351 of 1976. 7th February, 1977.

finding of the lower appellate Court was, therefore not acceptable, and the said Court had erred in law in reversing the finding of the trial Court on this aspect, without any evidence on record. The sale in favour of the defendants was, therefore, not binding on the trust.

[*Para.* 6.]

Cases referred to:—

Bishwanath v. *Sri Thakur Radha Ballabhji*, (1967) 2 S.C.J. 331: (1967) 2 S.C.R. 618: A.I.R. 1967 S.C. 1044; *Manikkanarasimhachari* v. *Ramasubbier*, (1970) 1 M.L.J. 337: 82 L.W. 677.

Appeal against the decree of the District Court of West Thanjavur at Thanjavur in Appeal Suit No. 122 of 1974, preferred against the decree of the Court of the Subordinate Judge, Kumbakonam in Orignal Suit No. 89 of 1968.

R. Muthukumaraswamy, *V. Thiruvenkatachari* and *K.S. Srinivasan*, for Appellant.

K. Raman, *B. Rajagopalnan* and *N. Vanchinathan*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. The suit was filed for recovery of the suit properties from defendants 6 to 14. One Subbaraya Iyer purchased originally a small bit of land in Raghunathapuram, which is a hamlet of Sholapuram within the Sub-Registration District of Tiruvidaimaruthur, Kumbakonam taluk, and with his own money put up a tiled building and planted cocoanut trees. In the building he installed "Sri Ramachandramurthy" and consecrated the same and was performing daily *pooja*, and *neivedyam* and was also conducting festivals on important occasions. Later on, by a deed of endowment dated 4th September, 1904 he constituted this into a trust and endowed also other properties. He called the trust property as a public charitable trust. The Hindu community of the village were worshipping in the *madam*, doing *bajanai* and holding festivals on important occasions. The trust deed provided also for the management of the trust properties and the *madam*. The founder constituted himself as the first trustee and further provided that after his death, the eldest of his brothers should become a trustee and thereafter the eldest sons of his brothers should succeed and manage the properties as sole trustees. In the event of a failure to assume the trusteeship by any persons referred to above, or on their acting adversely to the trust, the deed further provided that it would be open to anybody who is interested in the trust or any worshipper to take steps in a Court of law to either have the trustees removed or seek the appointment of a trustee and ask for such other relief, as might be necessary. It appears that there were also certain buildings which were used as shops. The original founder died in the year 1940 and he was succeeded by one of his brothers by name C.V. Panchapagesa Iyer. He was managing the properties as a trustee, conducting the festivals and performing the daily *pooja*, for about six or seven years. The first defendant is the son of the said Panchapagesa Iyer. Panchapagesa Iyer is now reported to be dead. But, even during his lifetime, he began to alienate the endowed properties in favour of defendants 6 to 9. Under Exhibit B-12, dated 15th August, 1957, Panchapagesa Iyer and his son (the first defendant) sold an extent of 20 cents, which included the *madam* proper, to the 6th defendant. The same two vendors executed another sale deed on 30th January, 1957 in favour of the 9th defendant, conveying another extent of 20 cents. With the consideration, it appears that they purchased a building in a nearby village called Kumbakonam, another property, removed the Sri Rama Pattabhisheka picture which was consecrated in the suit property and installed the same in the property newly purchased at Kumbakonam. The plaintiff, who is the grandson of the original founder, has filed this suit for a declaration that the alienations are not binding on the trust and for recovery of possession of the suit properties.

2. The main defence was that Raghunathapuram, which is part of Sholapuram village, had subsequent to the constitution of the trust and the consecration of the *madam*, become predominantly a Muslim locality, that the then trustee, Pancha-

pagesa Iyer and the first defendant, considered it not congenial to have the *madam* or the performance of the festivals in that area and that therefore, having the interest of the temple as the primary consideration, sold the properties to the defendants and constituted another *madam* in Kumbakonam village. The defendants also raised the plea that the plaintiff has no *locus standi* to file this suit since he is not either a trustee or a person entitled to become a trustee and that therefore he could not maintain the suit. Incidentally, a question was also raised as to whether the suit properties are public trust.

3. Both the Courts below, on a consideration of the document and the recitals therein, came to the conclusion that it is a public religious and charitable trust. That the trust is of a public nature, admits of no doubt, because even in the document itself it is stated that the trust belonged to Raghunathapuram villagers and it is also specifically mentioned that it is a public, religious and charitable trust. The finding has, therefore, to be confirmed and we have to proceed on the basis that it is a public trust.

4. The trial Court dismissed the suit on the ground that the plaintiff is neither a hereditary trustee nor can he claim to be a trustee under the document. The lower appellate Court has confirmed this finding. But, the learned counsel for the appellant points out that while he claimed to be the sole hereditary trustee, he also stated in the plaint that even otherwise, as a person interested in the trust, he is entitled to file the suit. The finding of the Courts below that he is neither a trustee nor a hereditary trustee, nor is he entitled to become a trustee under the document, is correct as the founder himself, though he had an adopted son, did not mention about his right to become a trustee; but on the other hand stated that after him, the eldest of his brothers should become the trustee and after him, the eldest son of such trustee should become the trustee. It is only if that line of succession failed, anybody else could become a trustee, and even then, such a trustee could be appointed only by the Court and not by the inheritance. The plaintiff cannot, therefore, claim to be a trustee. But, even otherwise, as a person interested, the learned counsel for the appellant contended, he is entitled to file the present suit for declaration of title and for recovery of possession. In support of this contention, the learned counsel relied on the decision of the Supreme Court in *Bishwanath and another* v. *Sri Thakur Radha Ballabhji and others*[1], and a decision of this Court in *Manikkanarasimhachari* v. *Ramasubbier and others*[2]. In *Bishwanath* v. *Radha Ballabhji*[1], the Supreme Court held that when a trustee, acting adversely to the interest of the idol, alienates the trust property, even a worshipper can file the suit the reason being that the idol is in the position of a minor and when the person representing it leaves it in the lurch, a person interested in the worship of the idol can certainly be clothed with *ad hoc* power of representation to protect its interest and that to such a suit, section 92, Civil Procedure Code is not applicable. In *Manikkanarasimhachari* v. *Ramasubbier*[2], this Court held:

> "When there is a wrongful alienation not binding upon the trust and when the alienating trustee still functions as a trustee and has not been removed, it will be open to the worshippers or the beneficiaries to maintain a suit for possession of the trust property after declaring the alienation invalid; when such possession is asked for, the decree for possession will be in favour of the alienating trustee himself, because so long as he is a trustee he is the only person who is entitled to the lawful possession of the property........ section 92, Civil Procedure Code, is not applicable to such a suit".

These are clear authorities for the position that the plaintiff, as a person interested in the trust though he may not have been residing in the village where the *madam* is situate, is entitled to maintain the suit.

5. The important question that therefore arises for consideration is whether the alienation in favour of defendants 6,

1. (1967) 2 S.C.J. 331 : (1967) 2 S.C.R. 618 : A.I.R. 1967 S.C. 1044.
2. (1970) 1 M.L.J. 337 : 82 L.W. 677.

to 9 by the first defendant and his father as trustees, is valid.

6. There can be no doubt that the alienations were for proper consideration and that is the finding of both the Courts below. The only question is about the legal validity of the transaction. The defendants sought to support the alienations on the ground that the locality wherein the *math* was functioning had become predominantly a Muslim area, that the *math* was not having a congenial atmosphere and that in those circumstances if the trustees had *bona fide* acted believing it to be in the interest of the trust and sold the property, the sale could not be invalidated on the mere ground that it is a trust property. The defendants also relied on the fact that the amount realised as consideration was again re-invested in purchasing another building in another village wherein one Ramapattabhisheka picture was again installed. The trial Court negatived this contention, but the lower appellate Court had accepted the same. While we may assume that a trustee will have such a power to alienate the *madam* building itself in cases where the purpose for which the trust was created or the worship could not be carried on in the place, and that the trustees have a right to shift the *madam* to some other place, we do not find sufficient facts in this case for establishing that there was something in the nature of impossibility of performance of the religious festivals or daily *pooja* or daily *bhajan* in the *madam*. None of the witnesses, as rightly pointed out by the trial Court have spoken about any interference to the proper functioning of the *madam* by any of the Muslims in the locality. The lower appellate Court had assumed that the entire population in the village had become Muslims except two Brahmin families. The evidence only disclosed that in the particular street where the *madam* is situate, most of the residents are Muslims and only four or five houses belong to Hindus. The total number of houses in the entire street is mentioned as 20 or 22. But, there is no evidence to show that there were no Hindus in the other portion of the village. The fact that in the street in which there is the *madam* there were Muslims would not by itself show that the *madam* could not be utilised as a place of worship or for the purpose of *bajanai* or other festivals. The assumption of the lower appellate Court that the entire village had become a Muslim populated place, is not supported by any evidence. The finding that the trustees were within their rights in shifting the place of worship to Kumbakonam from Sholapuram is, therefore, on the wrong assumption that there are no Hindus except two Brahmin families in Sholapuram Village. The finding of the lower appellate Court is, therefore, not acceptable, and the said Court has grievously erred in law in reversing the finding of the trial Court on this aspect, without any evidence on record. The sale in favour of the defendants is, therefore not binding on the trust. As held by this Court in *Manikkanarasimhachari* v. *Ramasubbier*[1], since the plaintiff in this case has filed the suit only as a person interested and he himself was not a trustee, though there will be a declaration of the title of the plaintiff trust, the decree for possession should be given in favour of the first defendant who is the alienating trustee.

7. There will accordingly be a decree declaring the suit properties as trust properties and directing delivery of possession of the same to the first defendant.

8. Learned counsel for defendants 6 to 9 pointed out that they have parted with valuable consideration and in fact there is evidence to show that with the money the first defendant and his father had purchased some property in Kumbakonam. The 9th defendant further stated that in a portion of the property purchased by her, she had even put up a construction. But I could not give any relief in these proceedings, as once the alienations are not binding, the trust is entitled to recover possession and if the defendants are entitled to any relief against the 1st defendant, that will not be affected by any decree passed in this suit.

9. With these observations, the second appeal is allowed and there will be a

1. (1970) 1 M.L.J. 337 : 82 L.W. 677.

decree in favour of the plaintiff as stated above. No costs.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*P. Govindan Nair, C.J.* and *Ramanujam, J.*

Doraiswami .. *Appellant**

v.

Rettinammal and others .. *Respondents*

Evidence Act (I of 1872), sections 67, 68—Indian Succession Act (XXXIX of 1925), section 63—Suit for partition—Some of the defendants claiming succession under a will—Will registered—Genuineness of will challenged by plaintiff—Execution found not proved.

R filed a suit for partition of the properties left by her mother *A* who died in December, 1952. The 2nd and 4th defendants who were the sons of *A* set up a will dated 15th February, 1952 as left by *A* and this was registered. The plaintiff *R* challenged the validity, truth and genuineness of the said will. The trial Court held that the will had not been proved and granted a preliminary decree which was confirmed by the High Court. The third defendant filed an appeal under the letters patent.

Held: In the circumstances of the case, it was not possible to accept the version of P.W. 5 that he could identify the signature of *A* in the disputed document. Even assuming that the signature found in the document was that of *A*, it would not automatically follow that *A* had executed the will. The identification of the signature of *A* would only mean that the document contained the signature of *A*. That would not amount to proof of the execution of the document, as there was a possibility of *A*'s signature having been taken on blank paper or on a misrepresentation that the document represented a different transaction. [*Para.* 12.]

* L.P A. No. 20 of 1978. *28th September*, 1977.

Appeal under clause 15 of the Letters Patent against the order of N.S. Ramaswami, J., dated 5th November, 1974 in App. No. 435 of 1969.

M. Kalyanasundaram and *Md. Nazimuddin*, for Appellant.

M. Venkatachalapathy, R. Muthuukumaraswamy and *D. Raju*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.—This appeal is directed against the judgment of N.S. Ramaswami, J. in A.S.No. 435 of 1969 confirming the decision of the Sub-Court, Coimbatore in O.S.No. 345 of 1964.

2. The suit O.S.No. 345 of 1964 has been filed by one Rathnammal, the first respondent herein, for partition and separate possession of her 1/5th share in the suit properties consisting of a house in Coimbatore and certain lands in Peria Kodiveri village in Gobichettipalayam taluk. The plaintiff and defendants 2 to 4 are the children of the first defendant through his wife Annammal who died in December, 1952. The suit properties belonged to Annammal. On the ground that Annammal died intestate the plaintiff has claimed her one-fifth share in the suit properties. The fourth defendant who is another daughter of Annammal also claimed her one-fifth share by paying the necessary court-fee in her written statement. During the pendency of the suit the first defendant died. Thereafter the plaintiff and the fourth defendant each claimed one-fourth share.

3. Defendants 2 and 3 who are the sons of Annammal had set up a will dated 15th February, 1952, as the last will and testament left by Annammal. Under that will Annammal's two daughters, namely, the plaintiff and the fourth defendant got only a sum of Rs. 1,000 each and all the other properties are to be taken by defendants 2 and 3 with a life interest to the first defendant. The plaintiff has questioned the validity, truth and genuineness of the said will, and her specific case is that the will is a forged document. She also alleged that in any event the will should be taken to have been brought

about by undue influence and coercion on the part of the first and third defendants.

4. The trial Court on a due consideration of the entire evidence on record held that the execution of the will Exhibit B-1 has not been duly proved. In that view the trial Court passed a preliminary decree for partition. The decision of the trial Court was challenged in appeal before this Court by the third defendant. N.S. Ramaswami, J., dismissed the appeal holding that though the will has been registered there was no evidence on the basis of which one can safely conclude that Annammal herself did appear before the Sub-Registrar and admitted the execution of the said document, that the evidence of D.W. 1, the Sub-Registrar will merely establish that a person calling herself Annammal appeared before him and that she admitted the execution of the will, but that it is quite inconclusive to show that Annammal, the mother of the plaintiff admitted the execution of the documents before the Sub-Registrar, that in view of the continued illness of Annammal, it is possible that someone else impersonated her before the Sub-Registrar and that, therefore, it is not possible to hold that the execution of the will Exhibit B-1 has been duly proved. He also held that the provisions of section 69 of the Evidence Act have not been satisfied, and D.W. 3, the only attesting witness alive who is said to have attested the document has denied the same. The said decision of the learned Judge has been challenged in this appeal by the third defendant.

5. Thus the only question that arises in this appeal is as to whether the execution of the will, Exhibit B-1 has been duly proved. The question as to whether Exhibit B-1 is proved has to be decided in the light of sections 67 and 68 of the Evidence Act and section 63 of the Indian Succession Act. Under section 67 of the Evidence Act, if a document is alleged to be signed by any person the signature of that person must be proved to be in his handwriting and for proving such a handwriting the opinions of experts and of persons acquainted with the handwriting of that person are made relevant under sections 45 and 47 of the said Act. Section 68 deals with the proof of the execution of the document required by law to be attested, and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Section 63 of the Indian Succession Act provides for special requirements of attestation of wills, and it says that a will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark in the will and each of the witnesses had signed the will in the presence of the testator. We have to therefore, consider the evidence adduced by the parties in this case in the light of the above statutory provisions.

6. In considering the question whether the will, Exhibit B-1 has been duly proved, certain admitted facts have to be noted. The agricultural lands covered by the suit are in Peria Kodiveri village and the first defendant was living there. Annammal has been living with him till 1951, when she left him and went over to Coimbatore, and had been living with the plaintiff since then. Annammal was suffering from cancer even before 1951, and she had been taken to Vellore and Madras for treatment by the plaintiff. The plaintiff would allege that ever since 1951, the first defendant has been living in the said village with a mistress by name Malaikari and that the will has been forged by the first defendant and that it has been created using her as a tool. This is however disputed by the first and third defendants. But the fact that Annammal continued to live with the plaintiff in Coimbatore and that she was suffering from cancer has not been disputed. As a matter of fact, the evidence of P.W. 1, in this regard has not been challenged in cross-examination though a faint allegation was made on behalf of the third defendant that Annammal went over to Coimbatore only just two months prior to her death. In fact, the third defendant as D.W. 3 did not follow up the above suggestion made to the plaintiff that her mother went to Coimbatore only two months prior to her death, but gave an entirely different version that his mother came to Coimbatore about four months before her death. It is in this background we have to see whether the

execution of the will, Exhibit B-1 has been proved.

7. The will, Exhibit B-1 has been attested by 3 persons apart from the scribe, one Krishna Rao of Satyamangalam. It is said that out of the said four persons only one is alive and the rest are dead. The only attestor who is alive is one Ranga Naicken who has been examined as D.W. 3. The evidence of D.W. 3 is that he did not attest any will as claimed by the third defendant. In fact, D.W. 3 is not a signatory to Exhibit B-1, and Exhibit B-1 contains only a mark said to have been made by D.W. 3 in token of attestation. D.W. 3 who is said to have made the mark when confronted with the mark found in Exhibit B-1 denied having made any such mark. He also denied any knowledge about the document Exhibit B-1. He is categorical in his statement that he was not present when Annammal is alleged to have executed the will Exhibit B-1. Thus, the will Exhibit B-1 cannot be said to have been proved through any of the attestors or the scribe. Therefore, the third defendant has examined the other witnesses to prove the execution of the will.

8. The other witnesses examined are D.W. 1 who was the Sub-Registrar of Satyamangalam from 1951 to 1955, and who has registered the will Exhibit B-1. D.W. 2 Chinna Nachi Navithan, son of the second attestor, Palani Navithan, and D.W. 5 one Arogiasami. It is the evidence of D.W. 1 the Sub-Registrar, that the testatrix Annammal presented Exhibit B-1 for registration on 15th February, 1952, that he adopted the usual procedure in registering Exhibit B-2, that he had also asked the testatrix whether the will was written according to her wishes and the particulars found in Exhibit B-1 were correct and that the testatrix answered these questions in the affirmative. He has also deposed that the testatrix was in good health physically and mentally, at the time of the registration and he took her thumb impression and signature in the course of the registration of the document Exhibit B-1.

9. D.W. 2 has deposed that his father Palani Navithan died in 1953, that he is the second attestor in Exhibit B-1 and that he knew his father's signature. He however admitted that he does not know personally about his father signing the will. D.W. 5, has deposed that he is acquainted with Annammal's signature and that the signature found in Exhibit B-1 was that of Annammal and that Annammal's physical condition at the relevant time was normal. He however admits that his paternal aunt is the mother-in-law of the third defendant and that he came to know about the details of the will through Annammal when negotiation took place for the 3rd defendant's marriage in May, 1952. This witness also admits that he has not seen Annammal signing Exhibit B-1. He further stated that he could recognise the signature of Annammal, as he had received two or three letters from Annammal in connection with the marriage of the third defendant. The question is whether the evidence of D.Ws. 1, 2 and 5 even if accepted is sufficient to prove the execution of the will Exhibit B-1.

10. No doubt, D.W. 1, the Sub-Registrar has deposed that one person called Annammal appeared before him and presented Exhibit B-1 for registration and that he followed the usual procedure in registering the document. D.W. 1, does not know Annammal personally. Therefore, his evidence can only prove that one person styling herself as Annammal appeared before him and presented the document for registration and answered his questions and put her signature and thumb impression in the document Exhibit B-1 in his presence. This evidence is quite insufficient to show that Annammal has in fact presented the document for registration. There is absolutely no evidence that Annammal did go to the Sub-Registrar's Office for registering Exhibit B-1 or that the person who appeared before the Sub-Registrar and presented the document is Annammal herself. Since there is a possibility of someone else impersonating Annammal, the third defendant should prove conclusively that Annammal was the person who appeared before the Sub-Registrar and presented the document for

registration, especially when a suggestion has been made by the plaintiff that one Malaikari, the mistress of the first defendant, was made to impersonate Annammal before the Sub-Registrar. Thus the evidence of D.W. 1 the Sub-Registrar is quite inadequate to prove that Annammal herself appeared before him and presented the document for registration.

11. D.W. 2, merely identifies the signature of Palani Navithan found in Exhibit B-1, as that of his father. The mere fact that the signature of Palani Navithan is proved, in our opinion is not sufficient to prove the due execution of the will. The evidence of this witness is relied on for proving the signature of one of the attesting witnesses and thus enable the third defendant to adduce secondary evidence regarding the due execution of the will. The evidence of D.W. 2 will be relevant only for purposes of section 69 of the Evidence Act. Section 69 will come into play only when no attesting witness can be found. In this case, as already stated, an attesting witness D.W. 4, has been examined and he has denied his attestation of the document. Therefore section 69 can have no application. The evidence of D.W. 2, therefore, even if accepted, will not help the third defendant.

12. The only attesting witness examined before the Court has denied his attestation and any knowledge of the execution of the document by the testatrix. The execution of Exhibit B-1 may, therefore, be proved by other evidence in view of section 71 of the Evidence Act. It is in this connection the evidence of D.W. 5, becomes material. He claims that he has known the signature of Annammal as she had written two or three letters to him in connection with the third defendant's marriage. The said letters have not been produced. Admittedly, the third defendant was married in May, 1952. But, as already noticed, from 1951 onwards Annammal has been living in Coimbatore (Sowripalayam). D.W. 5 also is a resident of Sowripalayam, Coimbatore. When D.W. 5 and Annammal lived in the same place (Sowripalayam), it is not possible that Annammal had been writing letters to him regarding the marriage of his son, the third defendant. Admittedly D.W. 5 is a person interested in the third defendant inasmuch as the third defendant married his paternal aunt's daughter and he was instrumental in bringing about the marriage. In these circumstances, it is not possible to accept the version of D.W. 5, that he can identify the signature of Annammal in the disputed document Exhibit B-1. Even assuming that the signature found in Exhibit B-1, is that of Annammal, it cannot automatically follow that Annammal had executed the will Exhibit B-1. The identification of the signature of Annammal in the document will only mean that the document contains the signature of Annammal. That will not amount to proof of the execution of the document, as there is a possibility of Annammal's signature having been taken on blank paper or on a misrepresentation that the document represents a different transaction. We have to therefore agree, with the view of N.S. Ramaswami, J. that the due execution of the will Exhibit B-1, has not been proved in this case.

13. Since the learned Judge in his judgment had commented upon the non-production of the mortgage deed said to have been executed by Annammal for comparison of her signature found in the will with that in the mortgage deed, the appellant has chosen to file an application for reception of additional evidence in this Letters Patent Appeal. But, we are of the view that in view of the provisions of Order 41, rule 27, it is not possible to permit the appellant to adduce additional evidence. The appellant could have called for the documents which are now sought to be marked as additional evidence even at the time of the trial of the suit by exercising due diligence and there is no reason as to why these documents could not have been called for at the stage of the trial. We do not, therefore, see any justification for permitting the appellant to mark the documents as called for in C.M.P. Nos. 5067 of 1975 nor are we satisfied that there is any justification for sending the documents to an expert for comparing the alleged thumb impression and signature of Annammal found in the

documents with the thumb impression and signture found in the will Exhibit B-1. In the circumstances, the appeal fails and is dismissed with costs. The petition for the appointment of receiver is dismissed.

S.J. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*N. S. Ramaswami, J.*

The Secretary to Government, Home Department and another .. *Appellants**

v.

T. V. Hari Rao .. *Respondent.*

Evidence Act (I of 1872), section 32 (5)—Government Servant—Suit for declaration of date of birth—Copies of horoscopes relied on—Date of birth as claimed held not proved—Evidentiary value of horoscopes.

The plaintiff, one *H*, a State Government employee, filed a suit for a declaration that his date of birth was 14th February, 1923 and not 15th May, 1921 as entered in his S.S.L.C. Book; for this he relied on copies alleged to be horoscopes relating to him. However the genuineness of the horoscopes was challenged by Government. The suit was dismissed but on appeal the plaintiff succeeded.

Held on further appeal: Statements contained in a pedigree or horoscope would certainly come under section 32(5) of the Evidence Act provided the other conditions are satisfied. A statement in a horoscope need not necessarily be one made at about the time of the birth of the child to attract section 32 (5). Even if it is made subsequently it would be admissible provided it had been made before the question in dispute was raised. [*Para.* 6.]

Even original horoscopes, though may be admissible under section 32 (5) of the Evidence Act, their evidentiary value is limited. In the present case, there is not even the original horoscope but only copies thereof. Even these copies have not been orally connected with the plaintiff. Therefore, it was held, that there was no evidence that the plaintiff was born on 14th February, 1923, as now claimed. [*Para.* 12.]

Cases referred to:—

Dolgobinda v. Nimaicharan, 1960 S.C.J. 879: A.I.R. 1959 S.C. 914; *Bharat Basi v. Gopinath*, A.I.R. 1941 All. 385; *V.M. Namboodri* v. *K.K. Kuruvila*, A.I.R. 1957 Ker. 103; *Parasram* v. *Dayaldas*, A.I. R. 1965 Him. Pra. 32.

Appeal against the judgment and decree of the City Civil Court, Madras in A.S. No. 165 of 1976.

The Additional Government Pleader, for Appellants.

G.K. Damodar Rao, for Respondent.

The Court delivered the following

JUDGMENT:—This second appeal by the State Government and the Director of School Education (the defendants in the suit) arises out of a suit for declaration that the date of birth of the plaintiff is 14th Ferbuary, 1923 and for a direction for entry of the said date in the service register. T.V. Hari Rao, the plaintiff in the suit was a Government servant. His date of birth as entered in the service register is 15th May, 1921. That is in accordance with his date of birth entered in the S.S.L.C. book which he declared to be correct when he entered service. As per that date the plaintiff was due to retire by 14th May, 1976. A few months prior to the retirement or superannuation, the plaintiff filed the suit for declaration and direction as mentioned earlier. According to him, his real date of birth is 14th February, 1923, that the date had been wrongly given as 15th May, 1921 in the S.S.L.C. book and that the same mistake had been carried over when he entered service. He said that sometime prior to the filing of the suit he came across certain old papers while searching for records in connection with a partition among members of his famliy and then he found Exhibits A-1 and A-2 said to be horoscopes relating to the

*S.A. No. 1577 of 1977. 8th November, 1977.

plaintiff in the handwriting of the plaintiff's father who is now no more. According to the said horoscopes, the date of birth is given as 3rd of *Masi* of *Thunthubi* year which corresponds to 14th February, 1923.

2. The defendants refuted the plaintiff's case that he was born on 14th February, 1923 and challenged the genuineness of the horoscopes relied on by the plaintiff.

3. The trial Court held that the plaintiff has not proved that he was born on 14th February, 1923, that the entry in the service register showing the date of birth as 15th May, 1921 is not wrong and that the horoscopes relied on by the plaintiff are not genuine and cannot be acted upon.

4. The plaintiff filed A.S.No. 165 of 1976 on the file of the City Civil Court, Madras, and the First Additional Judge, holding that Exhibits A-1 and A-2 are genuine documents, has given a declaration in favour of the plaintiff as prayed for. However, the plaintiff himself gave up, before the lower appellate Court, his prayer for a direction to the defendants to correct the entry in the service register. The only prayer stressed before the lower appellate Court was for a declaration that the plaintiff's real date of birth is 14th February, 1923. That has been granted by the lower appellate Court. Hence the second appeal by the defendants.

5. The finding of fact by the lower appellate Court is that the plaintiff had come across Exhibits A-1 and A-2, only some time prior to the institution of the suit, that the two documents were in the handwriting of the plaintiff's father and that therefore they are genuine documents. This finding cannot be attacked in second appeal. The question is whether there is legal evidence to prove that the plaintiff's real date of birth is 14th February, 1923, and not 15th May, 1921. Exhibit A-1, is described in the index of exhibits as original horoscope, but admittedly it is not the original. At the top of the paper containing the horoscope chart and the particulars of the child that was born, one finds the name, T.V. Hari Rao, B.A. Even according to the finding of the lower appellate Court this document ought to have been prepared only after the plaintiff had obtained the B.A. degree. Exhibit A-2 is only an elaboration of Exhibit A-1, and that is also said to be in the handwriting of the plaintiff's father. The view of the lower appellate Court is that the plaintiff's father ought to have had a *kurippu* containing the horoscopes and from that Exhibit A-1 should have been prepared. That means Exhibit A-1 is not the original horoscope but it is only a copy. Needless to say that Exhibit A-2 which is said to be a document which came into existence subsequent to Exhibit A-1 is also a copy and not the original.

6. At one stage the learned Advocate-General who appeared for the defendants-appellants contended that under section 32 (5) of the Evidence Act, the horoscope would be admissible as a statement of a deceased person only if the same has been prepared at about the time of the birth of the child; but I think there is no warrant for such a contention. If a deceased person had made a statement regarding relationship at any time before the question in dispute arose it would be admissible under section 32 (5) of the Evidence Act provided that the deceased who made the statement had special means of knowledge about relationship etc. As pointed out by the Supreme Court in *Dolgobinda* v. *Nimai Charan*[1], four conditions must be fulfilled for the application of sub-section (5) of section 32. They are: (1) The statements either written or verbal of relevant facts must have been made by a person who is dead or cannot be found etc. (2) The statements must relate to the existence of any relationship by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question. (4) The statement must have been made before the question in dispute was raised.

Statements contained in a pedigree or horoscope would certainly come under section 32 (5) provided the other conditions are satisfied. A statement in a

1. 1960 S.C.J. 879 : A.I.R. 1959 S.C. 914.

horoscope need not necessarily be one made at about the time of the birth of the child to attract section 32 (5). Even if it is made subsequently it would be admissible provided it had been made before the question in dispute was raised and the other conditions mentioned earlier are satisfied. Therefore, on the ground that the horoscopes, Exhibits A-1 and A-2 had not been written at about the time of the birth of the child it cannot be said that they are not admissible in evidence under section 32 (5). If the said horoscopes constituted a statement as contemplated under section 32 (5), then undoubtedly they would be admissible in evidence.

7. Now the finding is to the effect that Exhibits A-1 and A-2 are only copies of a horoscope which should have been prepared earlier. If the plaintiff's father had merely taken copies from a horoscope which had been prepared earlier, the question is whether the father was making a statement then. If taking of copies of an original document cannot be construed as a statement, then Exhibits A-1 and A-2 should be held to be inadmissible under section 32 (5). But I think it is unnecessary to give a finding as to whether Exhibits A-1 and A-2, being copies of an original horoscope, contained a statement as contemplated under section 32 (5), made by the plaintiff's father, for, even admitting these documents there is no evidence to prove that the plaintiff was born only on 14th February, 1923.

8. The plaintiff has examined himself as P.W. 2, and his elder brother has given evidence as P.W. 1. It is seen from their evidence that the plaintiff is the third child of their parents. Admittedly, the plaintiff has an younger brother. The point to be noted is that neither in the body of Exhibit A-1 nor in that of Exhibit A-2 there is any indication that they relate to the birth of the plaintiff. In the body of these two documents, all that is stated is that a male child was born on the 3rd of *Masi*, *Thundubi* year corresponding to 14th February, 1923. Of course the parents' names and other particulars are given. But what is missing is any indication that they relate to the birth of the plaintiff. If it is stated in the body of these two documents that the child was the third issue of the parents, then one can connect the evidence of P.Ws. 1 and 2 and hold that Exhibits A-1 and A-2 relate to the birth of the plaintiff. But there is no such reference in the body of Exhibits A-1 and A-2. Therefore, without the name 'T.V. Hari Rao, B.A.' being written in English at the top of the papers, the horoscopes may as well relate to the birth of the plaintiff's younger brother. The plaintiff wants to connect the two documents with his birth only by the name found written at the top of the documents as mentioned earlier. The trial Court, on a consideration of the evidence and examination of the two documents has given a categorical finding that the name T.V. Hari Rao, B.A. found at the top of the documents had been written in a different ink and it could not have been written at the same time when the horoscopes were written. The plaintiff and his elder brother who have given evidence have not specifically stated that the name of T.V. Hari Rao found written in Exhibits A-1 and A-2 is also in the handwriting of their father. Merely stating that the horoscopes are in the handwriting of the father would not necessarily mean that the name written at the top of the paper is also in the handwriting of the father. Their omission to speak specifically about this aspect has to be considered with the pleadings in the plaint.

9. In the beginning of the plaint it has been categorically stated that the horoscopes had been prepared and preserved by the plaintiff's brother. Lower down in the plaint, no doubt it is stated that the horoscopes are in the handwriting of the father. No attempt had been made to correct the first part of the plaint where it is stated that the horoscopes had been prepared by the plaintiff's elder brother. There is also nothing in the evidence that that statement in the plaint is wrong. Therefore in this background, one cannot conclude that the name T.V. Hari Rao had also been written by the plaintiff's father and that too at the time when the horoscopes were written. As I said, the trial Court has given a clear finding that the name T.V. Hari Rao, B.A., is in a different ink

and should have been written subsequently. This finding has not been disturbed by the lower appellate Court. That means the plaintiff has not shown that Exhibits A-1 and A-2 really relate to his birth.

10. It is also to be noted that the plaintiff has not produced birth register extract either regarding his birth or that of his brothers. It is stated that an application was made at the office of the Sub-Registrar of Musiri for birth register extract and that the office said that no entry was found. However, no documentary evidence has been produced even to prove the fact that an application was made in the office of the Sub-Registrar.

11. Anyway, as matters now stand, I am of the view that there is no evidence that Exhibits A-1 and A-2 really relate to the birth of the plaintiff. The version of P.Ws. 1 and 2 in the witness box that these two documents relate to the birth of the plaintiff is not legal evidence, for they speak only from what is contained in the documents and not from personal knowledge. They want to connect the documents with the birth of the plaintiff from the name T.V. Hari Rao written at the top. But that is not part of the horoscope, and as found by the trial Court, which finding has not been disturbed by the lower appellate Court, that writing is in a different ink, made subsequently.

12. Even original horoscopes, though may be admissible under section 32 (5) of the Evidence Act, their evidentiary value is very little—See *Bharat Basi* v. *Gopinath*[1], *V. M. Namboothiri* v. *K.K. Kuruvilla*[2] and *Parasram* v. *Dayaldas*[3]. In the present case there is not even the original horoscope but only copies thereof. Even these copies have not been really connected with the plaintiff. Therefore it must be held that there is no evidence that the plaintiff was born on 14th February, 1923 as is now claimed.

13. Misconstruing of evidence and acting without evidence is certainly a substantial question of law as between the parties. The second appeal is therefore allowed. The judgment and decree of the lower appellate Court are set aside and those of the tiral Court are restored. I make no order as to costs in the second appeal.

1. A.I.R. 1941 All. 385.
2. A.I.R. 1957 Ker. 103.
3. A.I.R. 1965 Him. Pra. 32.

S.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*V. Sethuraman, J.*

Valliammal (died) and others .. *Appellants**

v.

Palaniswamy and others ..*Respondents.*

Will—Executed and registered—Suspicious circumstances alleged—Burden of proof of truth and validity—Effect of registration.

The mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration would dispel any doubt as to the genuineness of the will. But if the evidence as to registration showed that it was done in a perfunctory manner and that the registering authority did not satisfy himself about the testator knowing the contents of the will, then the fact that he had registered the will would not be of much value. But the fact of registration is *prima facie* evidence of its execution and the certificate of the registering authority under section 80 of the Registration Act is relevant for proving execution. [*Para.* 6.]

Held, that in the instant case so far as the execution of the will was concerned, there was absolutely nothing to excite the sus-

* A.No. 304 of 1973. 13*th October,* 1977.

picion of the Court so as to call for better or further proof. [*Para.* 9.]

Cases referred to :

H. Venkatachala Iyengar v. *B.N. Thimmaiamma*, (1959) 1 S.C.R. (Supp.) 426 : A.I.R. 1959 S.C. 443 ; *Ram Purnima Debi* v. *Kumar Khagendra Narayan*, (1962) 1 S.C.J. 725 : (1962) 2 An.W.R. (S.C.) 27 : (1962) 2 M.L.J. (S.C.) 27 : (1962) 3 S.C.R. 195 : A.I.R. 1962 S.C. 567; *Mohammed Ihitisham Ali* v. *Jamna Prasad*, (1921) 48 I.A. 365 : 15 L.W. 104 : A.I.R. 1922 P.C. 56 ; *Gopal Das* v. *Sri Thamurji*, (1943) 2 M.L.J. 51 : 56 L.W. 593 : A.I.R. 1943 P.C. 83.

Appeal against the decree of the Court of the Subordinate Judge, Udumalpet in Original Suit No. 47 of 1972, dated 20th February, 1973.

S. Gopalaratnam, P. N. Venugopalan and M. A. Kanakaraj, for Appellants.

T. Raghavan, T.K. Seshadri, A.K. Mylswami and S. Palaniawamy, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 47 of 1972 in the Court of the Subordinate Judge of Udumalpet is the appellant. There was one Semalai Gounder, who had two wives. He had two daughters Muthammal and Palani Ammal through his first wife. He had three issues by his second wife *viz.*, two daughters Valliammal, the plaintiff and Ramathal and a son Palani Goundar. On the death of Semalai Gounder, Palani Gounder became entitled to his properties. Palani died in the year 1943. He had no issues and left behind only his widow Deivayanai Ammal alias Devathal. This Devathal fell ill sometime in October, 1969. One Dr. Sankunni practising in Pollachi paid one or two visits to her house to treat her. Subsequently as advised by him she entered his hospital at Pollachi on 24th October, 1969. At that time she appeared to have complained of pain in the abdomen and the chest region. It is not clear whether any test was conducted. But she was discharged on 1st November, 1969, without being cured. She was thereafter taken to the Christian Mission Hospital at Ottanchatram on 1st November, 1969. That seems to be a better equipped hospital and blood test was conducted there. It was found that she was suffering from what is popularly known as 'blood cancer'. It was realised that there was no cure for her ailment, and as desired by her, she was discharged sometime during the day of 3rd of November, 1969. She went back to her village known as Mettupalayam near Pollachi and died at the early hours of the 4th. If she had died intestate, then the properties would have devolved on the plaintiff, who is her husband's sister, solely as the other issues of Semalai Gounder are no more. She was, however, said to have left a will executed on 3rd November, 1969 and registered on the same day before the Sub-Registrar at Ottanchatram. The plaintiff came forward with the present suit claiming that she was the heir of Devathal and that the will was not valid, as she was not in a sound and disposing state of mind. According to the plaintiff the will could not confer any title on the defendants. The defendants are the legatees under the will and they have taken possession of the properties left by Devathal. The main question that arose for consideration in the suit was whether the will dated 3rd November, 1969 was true and valid. The learned Subordinate Judge held that the will was true and valid and therefore, he dismissed the suit. The plaintiff has come forward with the present appeal.

2. The only point that arises for consideration in the present appeal is whether the will alleged to have been left by Devathal is true and valid. At this stage the relationship between Devathal and the plaintiff may be briefly noticed. The plaintiff instituted two cases against the testator. In one case she was the sole plaintiff and in the other her sister Ramathal had also joined her. Both the cases were dismissed. She instituted O.S. No. 121 of 1952 on the file of the Sub-Court, Coimbatore along with Ramathal for appointment of a Receiver for the properties (in the possession of Devathal) making allegations of waste and neglect on her part. In the year 1952 Devathal had only a limited estate and, therefore, as the possible reversioners they came forward with the said suits. The suit was dismissed on 11th September, 1956.

The pleadings etc., in the said case were marked as Exhibits B-13 to B-19, and they disclose that the relationship between the testator and the plaintiff was strained.

3. In the will marked as Exhibit B-1 dated 3rd November, 1969 it is stated that Devathal was executing the will out of her own free will and in a sound disposing state of mind and without anybody's instigation and that she had brought up defendants 1 and 2 from their childhood, educated them and treated them as her own children. They are the children of her sister. She claimed to have celebrated the first defendant's marriage and stated that defendants 1 and 2 were managing her properties. Items 1 and 2 of the properties set out in the will were to be the absolute properties of defendants 1 and 2. The third defendant was to get a life interest in the third item. After her death, her heirs, if any, were to obtain the properties absolutely. But if she (the third defendant) left no heirs, that property should go to defendants 1 and 2. Devathal had another nephew by name Palaniswami through a different sister, and she directed a sum of Rs.3,000 being paid by defendants 1 and 2, and she directed also the discharge of the debts contracted by her. Defendants 1 and 2 were to get the moveables and were also to perform the ceremonies after her death. At page 3 of the will it is mentioned that she was suffering from cancer, that she was taking treatment in Christian Mission Hospital at Ottanchatram, and that she had no hope that she would live for a long time. According to the will she decided to execute it so as to avoid any litigation. She has signed in all the pages as Devathal.

4. She is known as Deivayanai Ammal with an *alias* name as Devathal. She signed in certain documents as Deivayanai Ammal and at any rate in one document as Devathal. The document in which she has signed as Devathal is Exhibit B-36 dated 16th July, 1959. Subsequently in several documents marked as Exhibits B-20, B-23, B-26, B-29, B-31, B-32, B-34 and B-35 she had signed as Deivayanai Ammal. The learned counsel for the appellant relied on her consistent signature of Deivayanai Ammal over a period of several years prior to her death, and referred to the statement in the will which, according to him, was a telltale one stating that she used to sign as Devathal. He relied also on Exhibit A-5 a certificate dated 26th January, 1970 issued by Dr. Sankunni Pallat, L.M.P., Pollachi, certifying that she was admitted in his clinic on 24th October, 1969 with high temperature and chest pain and that she was discharged on 1st November, 1969 in a delirium state. According to the learned counsel she did not recover her consciousness subsequently. He referred to the presence of the first defendant at the time of the so-called execution of the will and his suggestion was that the first defendant must have engineered the execution of the will. He relied also on the evidence let in the case as showing that she was not in a sound and disposing state of mind.

5. Before proceeding further with the examination of the facts, it is necessary to bear in mind the legal principles set out in several decisions of this and other Courts in testing the genuineness of a will. The question whether a will had been properly executed is substantially a question of fact. The decided cases could only show the indicia to be borne in mind in finding out whether the will was properly executed or not or, in other words, whether the will was a genuine one or not. The Supreme Court has elaborately examined this question in *H. Venkatachala Iyengar* v. *B.N. Thimmajammal and others*[1]. It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by section 63 of the Indian Succession Act. The onus of proving the will is on the propounder, and, in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law would be sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to

1. (1959) 1 S.C.R. (Supp.) 426: A.I.R. 1959 S.C. 443.

explain them to the satisfaction of the Court, before the will could be accepted as genuine. If there was any allegation of undue influence, fraud or coercion, then the onus would be on the person making the allegation to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, the propounder has to satisfy the conscience of the Court. In the aforesaid case of the Supreme Court the circumstances evoking suspicion were set out. The signature of the testator might be shaky and doubtful and the evidence of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated, and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator ; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of the relevant circumstances ; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicion should be completely removed before the document was accepted as the last will of the testator. Further, a propounder himself might have taken a prominent part in the execution of the will which conferred on him substantial benefits. If this was so, it was liable to be treated as a suspicious circumstance attending the execution of the will and the propounder would be required to remove the doubts by clear and satisfactory evidence. However, where there were suspicious circumstances which the propounder had succeeded in removing, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations. *See* summary of what was decided in *Venkatachala Iyengar's case*[1] and in *Rani Purnima Debi and another* v. *Kumar Khagendra Narayan and another*[2].

1. (1959) 1 S.C.R. (Supp.) 426: A.I.R. 1959 S.C. 443.
2. (1962) 1 S.C.J. 725: (1962) 2 An.W.R. (S.C.) 27: (1962) 2 M.L.J. (S.C.) 27: (1962) 3 S.C.R. 195: A.I.R. 1962 S.C. 567.

6. In the present case there is an additional circumstance that the will is a registered will. At page 732 in the above case, the Supreme Court pointed out that the mere fact that the will is registered will not by itself be sufficient to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property, and thereafter he admitted its execution and signed it in token thereof, the registration would dispel the doubt as to the genuineness of the will. But if the evidence as to registration showed that it was done in a perfunctory manner or that the registering authority did not satisfy himself about the testator knowing the contents of the will, then the fact that he had registered the will would not be of much value. There are cases in which registered wills have not been acted upon and those cases have been referred to at page 732 in the report of that case. But the fact of registration is *prima facie* evidence of its execution and the certificate of the registering officer under section 60 of the Registration Act is relevant for proving execution. As observed by Privy Council in *Mohammed Ihtisham Ali* v. *Jamna Prasad*[1], registration is a solemn act and if no other evidence is available, the Court can presume that the Registrar performed his duty of satisfying himself that the document presented to him for registration was duly executed by the executant and the executant was duly and properly identified before him. The same view was taken in *Gopal Das* v. *Sri Thakurji*[2], where Sir George Rankin observed that the evidence of due registration is itself some evidence of execution as against the other side.

7. In the present case the will was sought to be proved by examining the Sub-Registrar as D.W. 1 and the attes-

1. (1921) 48 I.A. 365: 15 L.W. 104: A.I.R. 1922 P.C. 56.
2. (1943) 2 M.L.J. 51 (P.C.): 56 L.W. 593: A.I.R. 1943 P.C. 83.

tors as D.Ws. 2, 3 and 4. The Sub-Registrar on that particular day was on casual leave and the head clerk had acted as the Sub-Registrar. Some comment was made about this circumstances; but I am not satisfied that the acting Sub-Registrar was not acquainted with the procedure to be adopted in registering the document. In fact, in his evidence he has stated that he read out the document to the testator, and that he asked her whether it was executed by her to which she replied that she had executed it and wanted it to be registered. He had also examined the witnesses and thereafter registered the document. Going through his evidence, I do not find any circumstance, which would militate against its acceptance.

8. D.W. 2 is Kumaravel. He is not related to the parties. It was he who was responsible for admitting her in the hospital. It was to him that she confided about her proposal to execute the will on the day of her arrival in Ottanchatram when the seriousness of her illness come to be realised. Thereafter the first defendant went to the village as desired by D.W. 2 and the testator, and brought the necessary records. The records were brought on 2nd at about 10 or 11 in the forenoon and when she was asked as to what should be done, she sent for one Kandaswami Gounder of Palani, who is D.W. 3 in the case. The first defendant went to Palani and brought Kandaswami along with D.W.4. Thereafter a draft was made on the 3rd morning and a fair copy was made in the afternoon and she signed the will in the presence of the attesting witnesses. On the same day, after discharge from the hospital she went to the Sub-Registrar's Office and had the will registered. It is thereafter that she went in the car to her native village where she died at the early hours of the 4th. There is nothing in D.W. 2's evidence also which would suggest any reason for its rejection. Kandaswami who came from Palani, has given evidence as D.W. 3. It is he who got the scribe, Palaniswami for the will. He was himself an Honorary Magistrate. The evidence of D.W. 4 shows that Devathal knew that she was executing a will. The scribe was not examined as he was dead. The draft is not produced as it was not available.

9. The two doctors in Ottanchatram Hospital have been examined as D.Ws. 6 and 7. Though they have not attested the document, they speak to her being alert and conscious before her discharge though she was weak. They are absolute strangers and it is unlikely that they would depose falsely for the purpose of supporting the defendants in propounding the will. It is not necessary for the purpose of this case to discuss the evidence of D.W. 5 who is the first defendant's Even taking that he would be interested in giving evidence in his own favour, the evidence of the other witnesses is overwhelming in support of the defendants' case that Devathal executed the will on 3rd November, 1969 when she was in full possession of her senses. As far as the execution of the will is concerned, there is absolutely nothing to excite the suspicion of the Court so as to call for better or further proof.

10. There is nothing unnatural about Devathal preferring the defendants as objects of her bequest. The plaintiff had dragged her into litigation and naturally it is not likely that there would be love lost between them. There is also the general tendency of a lady preferring her own relations to those of her husband. In addition, in the present case it is shown that defendants 1 and 2 have been living with her, have been brought up by her and have been helping her. It would be unnatural if she did not want to benefit them. The circumstances against the possibility of the plaintiff being benefited under the will are so clear that this is not a case in which the omission to give any benefit to her would assume any significance is considering the genuineness of the will.

11. The learned counsel for the appellant laid great emphasis on the fact that the lady had been signing as Deivayanai Ammal in several documents for several years preceding her death and that her signature in the will was as

Devathal with a statement to justify her signature as Devathal. As pointed out by the learned Subordinate Judge there is at least one document Exhibit B-36, whose genuineness is not in dispute and in which she has signed her name as Devathal. It may be that she was signing her name indifferently sometimes as Deivayanai Ammal and sometimes as Devathal. It is not necessary to speculate why this particular recital that she was usually signing as Devathal was put in the will. Whatever the reason, is when once it is proved that the document was executed by her and that she was in full possession of her senses at the time of the execution, this statement by itself cannot detract from acceptance of the will as a genuine document. Having considered all the facts, there does not appear to be any reason for rejecting the will. The finding of the learned Subordinate Judge on this point is correct and needs no interference. There is no dispute that if the will had to prevail, the plaintiff would be out of Court.

12. The appeal is accordingly dismissed with costs.

R S. —— *Appeal dimissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and M.A. Sathar Sayeed, JJ.*

M/s. Southern Steelmet and Alloys Ltd., represented by its Managing Director, I. S. Mittal .. *Appellant*

v.

B. M. Steels, Madras, by its Partners 2 to 5 and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *as amended by Central Act* (*CIV of* 1976), *Order* 21, *rule* 58—*Scope and applicability—Enquiry not to be summary—Decision should be as if rendered in a regular suit.*

There has been a drastic change in the literature, the mode of approach and the method by which a decision should be arrived at and which should be adopted by a Civil Court, when an application under Order 21, rule 58 comes up for adjudication. Whilst under the earlier law such an investigation of claim and objection to attachment of property, was summary in nature, the present law provides, as it were a significant departure in the matter of disposal and adjudication of such claims. The order contemplates a full enquiry into all questions including questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the Court enquiring such a claim petition shall determine such questions. There is also an embargo on the institution of a separate suit for the determination of such above questions. Sub-clause 4 of Order 21, rule 58 throws abundant light upon the nature and character of the decision ultimately to be arrived at by a Civil Court on such adjudication under Order 21, rule 58. It says that after the claims or objection has been adjudicated upon, the order made thereon shall have the same force and be subject to the same condition as to appeal or otherwise as if it were a decree. Though perforce an order is contemplated to be passed under Order 21, rule 58, that order has the legal effect of a decree. Such an order is a substitute for a decision resulting in a decree in an ordinary litigation. A decree as is understood both legally and commonly results in the adjudication of rights, privilages and duties of a party to a legal proceeding. Such being the intendment of the amended rule under Order, 21, rule 58 the enquiry contemplated under Order 21, rule 58 is no longer of a summary nature. but should be full, realistic, and after giving adequate opportunity to the parties concerned to prove their respective claims, rights, title and interest in the properties attached. [*Para.* 2.]

The adjudication referred to under Order 21, rule 58 not being summary and as it is the intention of the legislature under the amended Civil Procedure

* O.S.A. No. 1 of 1978. 1st February, 1978.

Code, that it should be a decision as if rendered in a regular suit resulting in an appealable decree so that it could ultimately decide and adjudicate on all questions including questions relating to right, title or interest in the property attached which either directly or indirectly arise between the parties to the proceeding. [*Para.* 3.]

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice V. Ramaswami dated 23rd December, 1977 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 3518 of 1977 in Application No. 3221 of 1977 in C.S. No. 354 of 1977.

K. Parasaran for *B. Soundarapandian*, for Appellant.

M. R. Narayanaswami, for Respondents.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—Two applications, A. No. 3578 of 1977 by B. M. Steels Private Limited and A. No. 3595 of 1977 by Maharashtra Bank for similar reliefs were filed on the Original Side of this Court under Order 21, rule 58 of the Code of Civil Procedure, stating that both the applicants as above were the owners of tor steel and M.S. rounds or were interested in them and which were at No. 32, Suryanarayana Chetty Street, Madras-13, and which, according to the company, were their goods and which, according to the bank were goods in and over which they had an enforceable legal right. The appellant as plaintiff instituted a suit C.S. No. 354 of 1977 on the file of the original side of this Court against a partnership firm known as B. M. Steels impleading the partners therein as defendants 2 to 6. Contemporaneous with the filing of the suit, an application for attachment before judgment was filed by the plaintiff-appellant. Notice in that application was served on the partnership firm B. M. Steels. When ultimately the application for attachment before judgment came up for final disposal B. M. Steels was prepared to give an undertaking not to alienate the goods belonging to it. In consonance with the undertaking which they wanted to give, they filed an affidavit, but later it was discovered, according to the plaintiff, that a large stock of over 52 tons of steel belonging to B. M. Steels which was available at No. 32, Suryanarayana Chetty Street, was not included in the affidavit of undertaking. It was also averred that there is every possibility of B. M. Steel transferring such goods in the aforesaid godown to another company which was an incorporated one and which is the applicant in Application No. 3578 of 1977 and that if B. M. Steels effected a transfer of such goods to the incorporated company, they would be put to irreparable loss. They sought therefore a physical attachment of those goods instead of accepting the affidavit of undertaking filed by B. M. Steels. Accordingly, an attachment was effected on 14th November, 1977 of goods, *inter alia* found at No. 32, Suryanarayana Chetty Street. The incorporated company as claimant filed Application No. 3578 of 1977 and sought for raising of the attachment claiming the goods as their own and setting up a title in themselves independent of that of B. M. Steels. This was opposed by the plaintiff in the main suit. When the claim petition as it is popularly called filed under Order 21, rule 58, Civil Procedure Code, came up for hearing, the learned Judge, enquired into the matter summarily and on the affidavits and probably on representations made before him at the time of the hearing, he mainly adverted to the fact that the supplies were made after the date of the incorporation of the private limited company, that such supplies therefore not having been made to the corporate body pursuant to any understanding or contract, they were not liable to pay for the goods and that, therefore, the attachment of their goods for a debt due by B. M. Steels is illegal. The contention of the plaintiff throughout was that the incorporated company is *alter* ego of B. M. Steels, that the memorandum of association of the incorporated company provides for the taking over of the busi-

ness of B. M. Steels which obviously includes its assets, that almost all the partners of B.M. Steels are the directors of the incorporated company and that therefore the claim that the goods at No. 32, Suryanarayana Chetty Street, are the goods of B. M. Steels is not sustainable. The learned Judge after referring to the contentions of the parties raised the attachment. As against this, the present appeal has been filed.

2. Mr. K. Parasaran, the learned counsel for the appellant, referred to us the change of law after the amendment of the Civil Procedure Code by Central Act CIV of 1976. There has been a drastic change in the literature, the mode of approach and the method by which a decision should be arrived at and which should be adopted by a Civil Court when an application under Order 21, rule 58 comes up for adjudication. Whilst under the earlier law, such an investigation of claim and objection to attachment of attached property was summary in nature, the present law provides as it were a significant departure in the matter of dispo al and adjudication of such claims. Order 21, rule 58 as it stands today reads as follows:—

"58. *Adjudication of claims to, or objections to attachment of property*:—

(1) where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:—

Provided that no such claim or objection shall be entertained

(*a*) Where, before the claim is preferred or objection is made, the property attached has already been sold; or

(*b*) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,—

(*a*) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(*b*) disallow the claim or objection; or

(*c*) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(*d*) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit if any, an order so refusing to entertain the claim or objection shall be conclusive."

The order contemplates a full enquiry into all questions including questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the Court enquiring such a claim petition shall determine such questions. There is also an embargo on the institution of a separate suit for the determination of such above ques-

tions. Sub-clause (4) of Order 21, rule 58 throws abundant light upon the nature and character of the decision ultimately to be arrived at by the Civil Court on such adjudication under Order 21, rule 58. It says that after the claim or objection has been adjudicated upon, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. Though perforce an order is contemplated to be passed under Order 21, rule 58, Civil Procedure Code, that order has the legal effect of a decree. Such an order is a substitute for a decision resulting in a decree in an ordinary litigation. A decree as is understood both legally and commonly results in the adjudication of rights, privileges and duties of a party to a legal proceeding. Such being the intendment of the amended rule under Order 21, rule 58, Civil Procedure Code, in our view the enquiry contemplated under Order 21, rule 58, Civil Procedure Code, is no longer of a summary nature, but should be full, realistic and after giving adequate opportunity to the parties concerned to prove their respective claims, rights, title and interest in the property attached. We are therefore of the view and rightly Mr. M. R. Narayanaswami appearing for the incorporated company agrees with us that there has not been such a full adjudication of the rights of parties by the learned Judge when he passed the order appealed against.

3. We are not traversing the merits urged by the parties before the trial Court and even before us. Though contentions mostly factual were raised by the parties, they stood there as bare contentions without being substantiated by corroborative evidence and acceptable material. We have already expressed the view that the adjudication referred to under Order 21, rule 58 Civil Procedure Code, not being summary and as it is the intention of the legislature under the amended Civil Procedure Code that it should be a decision as if rendered in a regular suit resulting in an appealable decree, we are of the view that a fuller examination of the rights of parties has to be held in the instant case after giving them adequate opportunity to place all relevant materials, before the trial Court, so that it could ultimately decide and adjudicate on all questions including questions relating to right, title or interest in the property attached which either directly or indirectly arise between the parties to the proceedings. This not having been done, we are constrained to set aside the order of the learned Judge and remit the subject-matter to the Original Side of this Court for a fuller and detailed examination as contemplated under the amended provision and for an ultimate decision after adjudication of the rights of parties. To the above extent, the appeal is allowed There will be no order as to costs.

R.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

Marudambal Ammal and others .. *Appellants**

v.

Marudanayagam Pillai and another .. *Respondents.*

Deed — Construction—Partition between father and sons—Earlier clause providing for absolute estate and later clause giving liberty to alienate only one item —Rest of the properties to be taken by male and female heirs after life of the person in whose favour absolute estate was created under the earlier clause — Nature of interest taken—Later clause not repugnant—Life estate held to have been created.

A document must be read as a whole and effort must be made to avoid repugnancy so that effect could be given to every clause in the document, if possible. So reading, the document of partition in the instant case, even though it will apparently appear from the first clause that

* S.A. No. 1615 of 1974. 20*th December*, 1977.

the first respondent got an absolute interest in the entire 'B' Schedule properties, a combined reading of that clause with the later clause will show that what the parties to the document intended was that he should have an absolute interest only in item 6 of the properties allotted to his share and that he shall not have the power of disposition by way of mortgage or sale over the other properties, and that those properties should, after his lifetime, belong absolutely only to his male and female heirs. If such a construction is not given to the documents effect could not be given to the later clause in the document. It could not be stated that the father and the three sons who were parties to the partition deed did not intend that the first respondent should have only a life estate in the 'B' Schedule properties other than item 6 therein and that those properties shall go after his lifetime absolutely only to his male and female heirs. It cannot be said that the later clause was repugnant and that the first respondent had an absolute estate in the properties. [*Para.* 11.]

Held also, that only a life-estate was created in the suit properties other than item 6 in favour of the first respondent.

Cases referred to:—

Sarin v. *Paplai,* (1966) 1 S.C.J. 199: (1966) 1 S. C. R. 349: A.I.R. 1966 S.C. 432; *Trichinopoly Varthaga Sangam Ltd.* v. *T. N. Shanmugasundaram,* I.L.R. (1939) Mad. 954: (1939) 2 M.L.J. 345: A.I.R. 1939 Mad. 769; *Pugalumperumal Pillai* v. *Thangathammal,* (1949) 62 L.W. 260: (1949) 1 M.L.J. 389: A.I.R. 1949 Mad. 690; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy,* (1897) I.L.R. 24 Cal. 834; *P. V. Subbayyan Chettiar* v. *Rajaram,* (1958) 1 M. L. J. 335: 1958 L. W. 124; *Ramkishore Lal* v. *Kamal Narain,* (1963) 2 S.C.R. (Supp.) 417: A.I. R. 1963 S.C. 890; *Sahebyada Mohd. Kamgar Shah* v. *Jagdish Chandra Deo,* (1960) 3 S.C.R. 604: A.I.R. 1960 S. C. 953; *Ramachandra Shenoy* v. *Mrs. Hilda Brite,* (1964) 2 S.C.R. 722: A. I.R. 1964 S.C. 1323.

Appeal against the decree, dated 9th April, 1973 of the Court of the Subordinate Judge, Tiruchirapalli in Appeal Suit No. 314 of 1971 preferred against the decree of the Court of the District Munsif of Kulitalai in Original Suit No. 879 of 1967.

L. V. Krishnaswamy Iyer and *L. K. Sankaran,* for Appellants.

R. T. Gopalakrishnan, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in Original Suit No. 879 of 1967 on the file of the District Munsif's Court, Kulitalai, who succeeded before the trial Court but lost before the lower appellate Court in the appeal filed by the second defendant—second respondent, are the appellants. The first respondent is the first defendant. The suit was filed against the first respondent, the husband of the first appellant and father of the other minor appellants, and the second respondent for a declaration that the sale of the suit property by the first respondent in favour of the second respondent was not binding on the appellants beyond the life time of the first respondent on the ground that the first respondent was entitled only to a life interest in the property by reason of the terms of the partition deed Exhibit A-2, dated 30th December, 1959 entered into between the first respondent and his two brothers and their father Manickam Pillai. The defence of the second respondent who alone contested the suit was that the first respondent got an absolute right in the property and was entitled to alienate the property to him by the sale deed Exhibit B-1. The second respondent's case was that under the first clause in the partition deed, the first respondent got an absolute estate in the property and that it cannot be curtailed into a mere life interest by the later clause in the document.

2. The trial Court decreed the suit holding that the first respondent got only a life estate in the property under the partition deed Exhibit A-2 and that the sale of the property by the first respondent in favour of the second respondent under Exhibit B-1 was not valid beyond his lifetime. But, on appeal it was held by the learned II Additional Subordi-

nate Judge, Tiruchirapalli, that the earlier clause in the partition deed gave an absolute estate and that the later clause curtailing it was not valid. In that view, the learned II Additional Subordinate Judge upheld the sale of the property by the first respondent in favour of the second respondent under Exhibit B-1 and allowed the appeal and dismissed the suit.

3. The only point for consideration is whether the first respondent got an absolute estate or only a life estate in the property under the partition deed Exhibit A-2 and the sale by the first respondent in favour of the second respondent under Exhibit B-1 was not valid beyond his life-time.

4. The first respondent got under the partition deed Exhibit A-2 for his share the properties described in schedule B. The sale deed Exhibit B-1 has been executed in respect of item 1 of those properties. The recital in the partition deed Exhibit A-2 regarding the interest which the first respondent took in the B schedule property is this:

> "ஷெடியூல் சொத்துக்களை 2-லக்கமிட்ட மருதநாயகம் பிள்ளையும் BCஷெடியூல் சொத்துக்களை3-லெக்கமிட்ட சண்முகப் பிள்ளையும் D ஷெடியூல் சொத்துக்களை 4-லக்கமிட்ட நடேசனும் சர்வ சுதந்திர பாத்தியங்களுடன் அனுபவித்துக் கொள்ள வேண்டியது"

The later portion of the partition deed contains the further recitals:

> "கடனை தீர்க்க முடியாவிட்டால் 2,3,4. லெக்கமிட்டவர்களின் BCD ஷெடியூல்களில் உள்ள 6வது அயிட்ட சொத்தை மட்டும் ஈடோ கிரயமோ செய்து டி கடனை தீர்த்துவிட வேண்டியது அது தவிர மற்ற எந்த சொத்துக்களையும் எவ்வித பராதீனங்களுக்கும் உட்படுத்தாமல் அவரவர்கள் ஆயுளுக்குப்பின் அவரவர்கள் ஆண், பெண் வாரிசுகள் சம பாகங்களாகவும் சர்வ சுதந்திர பாத்தியங்களுடனும் அடைந்துகொள்ள வேண்டியது."

Thus, according to the partition deed only item 6 of the B, C and D schedule properties could be alienated by way of sale or encumbered by way of mortgage for discharging the debts, and the sons who are parties 2, 3 and 4 to the partition deed have no right to alienate any of the other properties and those properties should go after their lifetime to their male and female heirs absolutely. The question is whether the earlier clause in the partition deed that the first respondent should take the B schedule properties absolutely should prevail and the later clause that he had a right to alienate only item 6 of those properties for discharging the debts, that he had no right to alienate any of the other properties and that those properties should go to his male and female heirs after his death, is repugnant and invalid in law. Reliance was placed on certain decisions, which will be referred to presently, by the learned counsel for the appellants and the second respondent in support of their respective contentions.

5. Section 88 of the Indian Succession Act provides that:—

> "Where two clauses or gifts in a will are irreconcilable so that they cannot possibly stand together, the last shall prevail."

We are not concerned with any gift in a will in the present case. We are concerned only with the partition deed Exhibit A-2. Section 10 of the Transfer of Property Act lays down:

> "Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

But, section 5 of the Transfer of Property Act says:

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living person and 'to transfer property' is to perform such act."

In *Sarin* v. *Paplai*[1], Gajendragadkar, C.J., has observed that:

"the true effect of partition is that each co-parcener gets a specific property in lieu of his undivided right in respect of the totality of the property of the family."

Therefore, it would appear that no transfer of property is involved in cases where properties belonging to two or more persons jointly as family properties are partitioned as amongst them.

6. The learned counsel for the second respondent relied upon three decisions in support of his contention that the later clause in the partition deed is repugnant to the earlier clause and is therefore invalid in law. The first of those decisions is of a Special Bench of this Court in *Trichinopoly Varthaga Sangam Ltd.* v. *T. N. Shanmughasundaram*[2]. In that case, a partition deed among the father and his sons provided that a certain house which had been used as the family residence should be held by them as tenants-in-common. The deed restrained the sons during as well as after the lifetime of the father from alienating their share to any stranger to the family but gave a right to sell within the family at a maximum which was for below the real value of the share of each son, with no obligation on any to buy at that price. The learned Judges held that the restriction on alienation amounted to an absolute restriction and therefore was void under section 10 of the Transfer of Property Act. This decision would not apply to the facts of the present case where there is no such restriction without any corresponding obligation on any other party to the document.

7. The second decision relied upon by the learned counsel for the second respondent is of a Bench of this Court in *Pugalumperumal Pillai* v. *Thangathammal*[1]. In that case, the mother executed a gift in favour of her daughter saying:

"As I have given away to you the property in the schedule herein as stridhanam gift, you shall hold and enjoy the aforesaid property hereditarily and from son to grandson and so on as long as the sun and moon last. After your lifetime, your issues if there are any shall get the aforesaid property. If you have no male or female issue the aforesaid property shall revert to me and to my male heir, shall till my lifetime reside jointly with you in the thatched house mentioned in the schedule."

It has been held that the daughter took the property absolute and not a mere life estate. The learned Judges have observed in their judgment thus:

"As observed by their Lordships of the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*[2], there are two cardinal principles in the construction of wills, deeds and other documents. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical words, or words of known legal import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not use the technical terms in their proper sense. Applying the principle mentioned above to the document in question, we do not feel any difficulty in holding that the intention of the donor was

1. (1966) 1 S.C.J. 199: (1966) 1 S.C.R. 349 A.I.R. 1966 S.C. 432.
2. I.L.R. (1939) Mad. 954: (1939) 2 M.L.J. 345 : A.I.R. 1939 Mad. 769.

1. (1949) 62 L.W. 260 : (1949) 1 M.L.J. 389 : A.I.R. 1949 Mad. 690.
2. (1897) I.L.R. 24 Cal. 834.

that her daughter should take an absolute estate."

This decision also will not apply to the facts of the present case where we do not find the terms of art such as those used in the document involved in that case, namely that the donee shall enjoy the property hereditarily and from son to grandson and so on as long as the sun and moon last.

8. The third decision relied on by the learned counsel for the first respondent is of Ganapatia Pillai, J., in *P. V. Subbayyan Chettiar* v. *Rajaram*[1]. The gift deed in that case read as follows:

> "At the request of the settlor, the mother and brother of the bride-to-be had agreed to give the bride, Balammai, in marriage to the settlor on condition that the settlor made a gift of the property (now in question) to Balammai; and the settlor, having agreed to this request, was making a settlement deed to effectuate the gift which he intended to make."

After this sentence in Tamil, followed another sentence which read thus:

> "The property should be enjoyed by the settlee and by the male heirs born to her by the settlor from generation to generation." "This subsequent sentence cannot in any sense control the full import or effect of the operative sentence which precedes it and by which the settlor had conferred an absolute estate in the property on his bride-to-be. It is settled law that such subsequent clauses detailing the mode of enjoyment or the devolution of the properties from generation to generation do not curtail the full effect of the operative clause, by which the settlor had already expressed his intention to confer an absolute estate on the settlee. It is well established that such a clause as 'to be enjoyed from generation to generation' indicates only a heritable estate."

In my view, this decision also will not apply to the facts of the present case, for the words of art such as those found in that document, namely, the settlee should enjoy the property from generation to generation, are not found in the document in question here.

9. The learned counsel for the appellants relied upon the following two decisions of the Supreme Court. The first decision is the one in *Ramkishore Lal* v. *Kamal Narain*[1]. There, the learned Judges have observed:—

> "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used.......... Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of a such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See *Sahebzada Mod. Kamgar Shah* v. *Jagish Chandra Deo Dhabal Deo*[2]). It is clear, however, that an attempt should always be made to read the two parts of the document, harmoniously, if possible. It is only when this is not possible, *e.g.*, where an absolute title given (is)

1. (1958) 1 M.L.J. 335 : (1958) L.W. 124.

1. (1963) 2 S.C.R. (Supp.) 417: A.I.R. 1963 S.C. 890.

2. (1960) 3 S.C.R. 604, 611: A.I.R. 1960 S.C. 953.

in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void".

10. In the other decision of the Supreme Court in *Ramachandra Shenoy and another* v. *Mrs. Hilda Brite and others*[1], the testatrix who died in February, 1946 had stated in clause 3 (*c*) of her will dated 25th July, 1907, that "all kinds of movable properties that shall be in my possession and authority at the time of my death *i.e.*, all kinds of movable properties inclusive of the amounts that shall be got from others and the cash all these my eldest daughter Severina Sobina Coelho, shall, after my death, enjoy and after her lifetime, her male children shall enjoy permanently and with absolute right". It has been held that the only reasonable construction of clause 3 (*c*) was that the interest created in favour of Severina was merely a life interest and the remainder in absolute was conferred on her male children. The learned Judges have observed at page 735 thus:—

> "It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of Construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained the will. It is for this reason that where there is a bequest to *A* even though it be in terms apparently absolute followed by a gift of the same to *B* absolutely 'on' or 'after' or 'at' *A*'s death, *A* is *prima facie* held to take a life interest and *B* an interest in remainer, the apparently absolute interest of *A* being out down to accommodate the interest created in favour of *B*. In the present case if, as has to be admitted, the testatrix did intend to confer an absolute interest in the male children of Severina the question is whether effect can or cainot be given to it. If the interest of Severina were held to be absolute no doubt effect could not be given to the said intention. But if there are words in the will which on a reasonable construction would denote that the interest of Severina was not intended to be absolute but was limited to her life only, it would be proper for the Court to adopt such a construction, for that would give effect to every testamentary disposition contained in the will".

11. In the light of the aforesaid decision of the Supreme Court relied upon for the appellants, an attempt has to be made to read the document as a whole and an effort must be made to avoid repugnancy so that effect could be given to every clause of the document, if possible. If that is done, it will be clear that even though it will apparently appear from the first cause that the first respondent got an absolute interest in the entire B Schedule properties, a combined reading of that clause with the later clause will show that what the parties to the document intended was that he should have an absolute interest only in item 6 of the properties allotted to his share and that he shall not have the power of disposition by way of mortgage or sale over the other properties. Those properties should after his lifetime belong absolutely only to his male and female heirs. If such a construction is not given to the document, effect could not be given to the later clause in the document. It could not be stated that the father and the three sons who were the parties to the partition deed did not intend that the first respondent should have only a life estate in the B schedule properties other than item 6 therein and those properties shall after his lifetime go absolutely only to his male and female heirs. Under these circumstances, it is not possible to uphold the judgment of the learned II Additional Subordinate Judge that the later clause is repugnant and that the first respondent had an absolute interest

1. (1964) 2 S.C.R. 722 : A.I.R. 1964 S.C 1323.

in the properties. I find that he had only a life estate in the suit properties.

12. The second appeal is accordingly allowed, but in the circumstances of the case, without costs.

R.S. —— *Appeal allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—*P. S. Kailasam, CJ., V. Ramasuami and V. Balasubrahmanyan, JJ.*

M/s. Traders and Traders, Importers and Exporters and Manufacturers' representative, Madras, .. *Petitioner**

v.

State of Tamil Nadu .. *Respondent,*

Tamil Nadu General Sales-Tax Act (I of 1959), section 13 (5)—Return of goods sold—Claim for refund of tax after six months of sale—Claim rejected—Held correct.

The petitioner sold medicine for Rs. 69,640 on 3rd March, 1966 and the customer returned the same on 2nd September, 1966. On 25th October, 1966, the petitioner claimed refund of tax in his monthly return for September, 1966. This was rejected by the assessing authority and by the Appellate authorities. On revision by the assessee, Held, (by majority).

As section 13 (5) of the Tamil Nadu Act (I of 1959) in very positive terms denied any claim for deduction after six months from the date of sale and emphasised that no adjustment or refund of tax could be made after the expiry of a period of six months from the date of sale in the concluding portion of the sub-section no refund was allowable in the present case. [*Para.* 4.]

Cases referred to :—

Madras Radiators and Pressings v. *State of Tamil Nadu,* (1976) 37 S.T.C. 123: (1976) Tax.L.R. 1533; *Devi Films (P.) Ltd.* v. *State of Madras,* (1961) 12 S.T.C. 274; *State of Andhra Pradesh* v. *Vauhini Pictures (P.) Ltd.,* (1962) 13 S.T.C 847; *Commissioner of Income-tax* v. *Bhogilal Lal Chand,* 1954 S.C.J. 122 : 25 I.T.R. 50: 1954 S.C.R. 444: A.I.R. 1954 S.C. 155: *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai & Co.,* 1950 S.C.J. 374: 18 I.T.R. 472 : 1950 S.C.R. 335: A.I.R. 1950 S.C. 134.

K. Mani for *V. Ramachandran* and *V. Narayanaswami,* for Petitioner.

The Additional Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Kailasam, C.J. (majority view).—This case is referred to a Full Bench by Ismail and Sethuraman, JJ. for determination as to the scope of section 13 (5) of the Tamil Nadu General Sales Tax Act, 1959.

2. The petitioner-assessee sold medicine (Methol) worth Rs. 69,640 by invoice No. 42688 on 3rd March, 1966 to the customer. The customer returned the goods on 2nd September, 1966, and it was brought to account on the same day. A credit note was also issued. On 25th October, 1966 the assessee claimed refund in his monthly return for September, 1966. On 25th January, 1969, the assessing authority rejected the claim. On appeal by the assessee, the Appellate Assistant Commissioner also rejected the claim on the ground that the claim was made beyond six months as provided for under section 13 (5) of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as the Act. The Tribunal also dismissed the appeal of the assessee. Hence the revision by the assessee against the order of the Tribunal.

3. The sale was on 3rd March, 1966 and the return of the goods by the customer was on 2nd September, 1966. In the monthly return for the month of September, filed on 25th October, 1966 in relation to assessment year 1966-67, an adjustment of tax was

* T.C. No. 142 of 1972. 16th December, 1976.

claimed. Section 13 (5) of the Act, introduced by the Tamil Nadu Act XV of 1964, before its amendment by Tamil Nadu Act XXXI of 1972 ran as follows:

> "Where a dealer has refunded the price of articles returned by customers together with the tax collected from such customers in respect of the sale of such articles and where the amount representing the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale, within a period of six months from the date of sale by adjustment in the assessment and the final assessment shall be completed accordingly, but such dealer shall not be entitled to claim any adjustment or refund of tax in respect of the sale of such articles after the expiry of the said period of six months."

This sub-section was further amended by the Tamil Nadu Act XXXI of 1972 whereby for the words "within a period of six months from the date of sale", the words "within such period as may be prescribed" and for the words "the said period of six months", the words "the period so prescribed" were substituted. The amendment by Act XXXI of 1972 is not relevant for our discussion and need not be taken any further note of.

4. If the case is to be decided on a reading of section 13 (5) alone, the dealer shall be entitled to claim deduction of the tax only within a period of six months from the date of sale. The deduction of the tax levied may be by adjustment in the assessment and the final assessment may be completed accordingly. But the dealer shall not be entitled to claim any adjustment or refund in respect of sale of articles after the expiry of the period of six months. On the ground of failure to satisfy this condition, the claim for deduction has to be dismissed. From the sub-section it is also clear that the claim for deduction may be by adjustment in the assessment and the final assessment shall be completed accordingly. This would mean that the return had been submitted, but the final assessment had not been made. But, on no ground, the dealer will be entitled to claim any adjustment, or refund of the tax, after the expiry of six months from the date of sale. As the section in very positive terms denies any claim for deduction after six months from the date of sale and emphasises that no adjustment or refund of tax can be made after the expiry of a period of six months from the date of sale, in the concluding portion of the sub-section, no refund is allowable in the present case.

5. But the reference to a Full Bench is necessitated as a Bench of this Court in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], after referring to the provisions of the Act and the scope of Rule 5-A (*b*) (i) of the Tamil Nadu General Sales Tax Rules, 1959, hereinafter referred to as the Rules, observed as follows:

> "Thus section 13 (5) and rule 5-A (*b*) (i) deal with different rights of a dealer."

One of the learned Judges who heard the revision felt that because of the express provisions of section 13 (5), the view that the two provisions, section 13 (5) and rule 5-A (*b*) (i) referred to different rights of the dealer might not be correct. The learned Judge was also of the view that the restriction of a period of six months could not be got rid of by reference to a rule and that in the event of there being a conflict, the Rule being a subordinate legislation, would have to yield to the statutory provisions itself.

6. We will now proceed to refer to the necessary provisions in the Act and the Rules and the decision in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1]. Section 2 (*p*) defines taxable turnover. Section 2 (*q*) defines total turnover and section 2 (*r*) defines turnover. Section 3 is the charging section. It provides

1. (1976) 37 S.T.C. 123; (1976) Tax.L.R 1533 (Mad.).

for levy of tax on sales or purchase of goods. *Explanation* 2 (*iii*) to section 2 (*r*) provides that:

"Subject to such conditions and restrictions, if any as may be prescribed in this behalf any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover."

The rule as prescribed under *Explanation* (*ii*) to section 2 (*r*) is rule 5-A of the Rules. That Rule provides that the amount specified in the clauses in the rule shall not be included in the total turnover of the dealer. Rule 5-A (*b*) (i) provides that all amounts refunded to purchasers in respect of goods returned by them to the dealer when the goods are taxable on the amount for which they have been sold shall be excluded in the total turnover of a dealer provided that the accounts show the date on which the goods were returned and the date on which the amount for which refund was made or credit was allowed to the purchaser.

7. Section 3 refers to total turnover for a year of a dealer and a casual trader, whatever be his turnover for the year, shall pay tax for each year. The year is defined in section 2 (*t*) as meaning the financial year. Therefore, when a total turnover, or turnover, or tax is mentioned, it is only for the financial year. In calculating the turnover, *Explanation* 1-A to section 2 (*r*) provides that any amount collected by a dealer by way of tax under the Act shall not be included in the turnover. Under *Explanation* 2 (*iii*) any amount refunded in respect of articles returned by customers shall not be included in the turnover. So in arriving at the turnover for the year, under *Explanation* 2 (*iii*) the amount refunded shall not be included. If the sale and the refund are in the same year, in computing the turnover, the amount refunded is not included, that is, the amount for which the property was originally sold, is excluded. As the sale has proved to be abortive the sale as well as the refund is excluded in the turnover for the year. Explanation 2 (*iii*) is subject to rule prescribed in this behalf. The rule prescribed is rule 5-A. That rule states that "in pursuance of *Explanation* (2) to section 2 (*r*) of the Act the amounts specified in the following clauses shall not, subject to the conditions specified therein, be included in the total turnover of a dealer." Amongst the amounts that are not to be included in the total turnover is the one contained in rule 5-A (*b*) (*i*) which states.

"all amounts refunded to purchasers in respect of goods returned by them to the dealer when the goods are taxable on the amount for which they have been sold, provided that the accounts show the date on which the goods were returned and the date on which and amount for which refund was made or credit was allowed to the purchaser."

The rule which is in pursuances of *Explanation* (2) to section 2 (*r*) enables a dealer not to include the amounts refunded to the purchasers. As the turnover for the purpose of taxation under section 3 is to be for the year, the non-inclusion is for the year. That is, section 2 (*r*). *Explanation* (2) (*iii*) and rule 5-A (*b*) (*i*) all relate to the turnover for the year. If both the transactions are not in the same year, that is, if the refund is in the subsequent year the refund cannot be included in the turnover for the year. As it was felt that the dealer should not be deprived of the refund of tax which he had paid for the sale, the Legislature intervened and introduced section 13 (5). That section was added by Act XV of 1964. The objects and reasons for introducing section 13 (5) are stated as follows:—

"Under *Explanation* (2) to the definition of 'turnover' in section 2 (*r*) any amount refunded in respect of articles returned by customers shall not be included in the turnover of a dealer. But when such articles are sold by a dealer at the close of a financial year and customers return those articles and obtain refund of the price from the

dealer sometime after the close of that year, the dealer is unable to exclude the amount of price so refunded by him from his turnover before he furnishes his return for that year. It is considered necessary that he should be enabled to claim deduction of the tax included in his assessment in respect of the sale of such articles. It is not however considered necessary that a dealer should have the benefit of claiming such deduction of tax or refund of such tax for any indefinite period. It is accordingly proposed to amend section 13 of the said Act, to allow adjustment of the amount of such tax in the assessment only if the dealer makes his claim within a period of six months from the date of sale."

The objects and reasons above extracted clearly show that as *Explanation* (2) in section 2 (*r*) and the rules framed thereunder would not enable a dealer to exclude the amount refunded by him after the close of that year, it was considered necessary that he should be enabled to claim deduction of the tax included in the assessment. Six months' time was granted under section 13 (5). He could claim deduction of tax levied in respect of such sale within a period of six months from the date of sale. This can be done by adjustment in the assessment and the final assessment can be completed accordingly. After the final assessment had been completed, he could ask for a refund of the tax in respect of the sale of such articles, but only within six months from the date of sale. This right to get an adjustment in the assessment will not be available after six months from the date of sale.

8. Whatever doubts there might have been before the enactment of section 13 (5) in 1964, the introduction of this sub-section made it clear that after its introduction reliance could not be placed on the rules to achieve the end of obtaining a tax deduction so far as the amount refunded was concerned. On this ground alone, it is safe to state that the dealer is not entitled to a refund of tax on the price refunded by him.

9. We will now proceed to examine the purport of rule 5-A (*b*) (i) which a Bench of this Court in *Madras Radiators and Pressings v. State of Tamil Nadu*[1] held dealt with different rights of a dealer than section 13 (5). The rule is framed, as already stated, in pursuance of *Explanation* (2) of section 2 (*r*) and deals with the contents of a turnover and permits a dealer to exclude from his turnover any amount refunded. The turnover, we are of the opinion is for the purpose of levy of tax under section 3 and it is for the financial year. Normally, it could not be understood as enabling a dealer to exclude the amount in the subsequent year. The rule does not advance the contention that it confers a different right. The rule enables a dealer not to include in his total turnover the amount refunded to purchasers. Not included in the total turnover would necessarily mean the turnover submitted for the year. This was realised by the Legislature and section 13 (5) was enacted to remedy this defect and not for conferring any separate right. We do not see any reason for holding that rule 5-A (*b*) (i) confers a different right, that is, the right to exclude the amount refunded in the subsequent year's return though the refund was not within a period of six months from the date of sale.

10. Two decisions were relied on by the Bench in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], for coming to the conclusion that different rights were conferred on the dealer. It may at once be stated that both the decisions were rendered when section 13 (5) had not been introduced. In *Devi Films (P.) Ltd.* v. *State of Madras*[2], a Bench of this Court was dealing with a sale under a hire-purchase agreement. The machinery was sold to four purchasers for Rs. 68,275 by the assessee under a hire-purchase agreement. The sales were in 1949, 1950 and 1951. The aggregate amount due under each of those agreements were taken into account in computing the taxable turnover of the

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1. (1976) 37 S.T.C. 123 : (1976) Tax.L.R. 1533.

2. (1961) 12 S.T.C. 274.

assessee in the year of transaction. The transactions being in the form of hire-purchase agreements the sale price was payable in instalments. The agreements provided that in default of payment of the instalments due, the assessee was entitled to a return of the goods.

It was further provided that when the goods were returned to the assessee, the liability of the purchaser to pay the remaining instalments ceased. In the assessment year 1955-56 four of the purchasers defaulted payment. The aggregate of the unpaid instalments on all these four transactions was Rs. 21,191-1-6. The assessee claimed that the entire amount of Rs. 68,275 which had suffered tax in the previous years should be deducted from its gross turnover in the assessment year 1955-56 during which the agreements were terminated and the goods were returned to the assessee. The Court held on a construction of rule 5 (1) (*b*) of the Turnover and Assessment Rules, which provided that in determining the net turnover, all amounts allowed to purchasers in respect of goods returned by them to the dealer shall be deducted, that if an allowance is made against the goods returned, the deduction can be claimed only in the year in which that allowance has been made and to the real extent of that allowance independent of the date of the sale. The Court also held that the date of the sale decides the inclusion in the assessee's assessable turnover and the date of allowance determines the exclusion from the gross turnover under rule 5 (1) (*b*).

It may be noted that what had been really allowed to purchasers in that case was the amount of the unpaid instalments of the sale price. The Court held that the assessee is not entitled to claim that the entire sale price has been allowed within the meaning of rule 5 (1) (*b*). The Court proceeded to explain that in the case of a transaction of a sale in the form of a hire-purchase agreement, where the goods themselves are returned to the seller and the unpaid instalments of the purchase money ceased to be payable under the terms of the agreement, the seller is entitled to claim under rule 5 (1) (*b*) the total of the unpaid instalments as an allowance made within the meaning of rule 5 (1) (*b*). In the circumstances of that case, the amount was included as an allowance. The facts disclose that the unpaid instalments cannot be included in the sale at all. Further as we observed at the outset, this decision was rendered before section 13 (5) was enacted and therefore it cannot be treated as an authority for the proposition with which we are dealing.

11. The next case that was referred to is the decision of the Andhra Pradesh High Court in *State of Andhra Pradesh* v. *Vauhini Pictures (P) Ltd*[1]. Construing rule 6 (1) (*b*) (i) of the Andhra Pradesh General Sales Tax Rules, 1957, the Court observed that the Rule does not state that the deduction claimed for refund of price in regard to the return of goods should be confined only to a particular period, and held that a refund in the assessment year in respect of sales effected in the year previous to the assessment year would also be within the purview of that rule. This decision was rendered in the absence of section 13 (5). We are unable to agree with this view.

12. In *Madras Radiators and Pressings* v. *State of Tamil Nadu*[2], the Bench has taken the view that there is no reason to restrict the operation of rule 5-A (*b*) (i) to a case of refund within the assessment year itself, as the rule does not state that the amounts refunded shall be excluded from the total turnover of the year in which the sale took place. We are unable to accept this view as the turnover is required to be submitted for the financial year according to the charging section, section 3. Read in the context of section 2 (*r*) and *Explanation* (2), the purport of the rule is clear in that it only enables the refunded amount to be excluded from the turnover of the year. This was how the definition section 2 (*r*), *Explanation* (2) to the definition and the rules were understood and the Legislature came forward with the amendment enabling the refund of the tax paid within a period of

1. (1962) 13 S.T.C. 847 (A.P.).
2. (1976) 37 S.T.C. 123: 1976 Tax.L.R. 1533 (Mad.).

six months from the date of sale. The wording of rule 5-A (*b*) (i) is significant in that it talks of the refunded amount to be excluded from the total turnover, which would mean that the refunded amount shall not be treated as part of the total turnover and that the refund must be relatable to the transaction which took place in that year. Though rule 5-B was introduced by a subsequent amendment in the year 1973, it also makes the position clear that no claim for adjustment or refund of the tax under sub-section (5) of section 13 can be entertained, if it is not made within a period of six months from the date of sale. This should clearly mean that an adjustment of refund cannot be obtained after six months from the date of sale and rule 5-A (*b*) (i) cannot be read in a manner which is inconsistent with this Rule.

13. We are satisfied that the decision in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], is erroneous. In any event, after the introduction of section 13 (5), the construction put forward by the Bench in the above decision is unsupportable.

Ramaswami, J.—(minority view)—I have had the advantage of reading the judgment of my Lord, the Chief Justice. Having given my careful and anxious consideration, I regret my inability to agree with the conclusion reached by the learned Chief Justice.

15. The assessee is a dealer who has opted for assessment under rule 18 of the Tamil Nadu General Sales Tax Rules, 1959 (hereinafter called the Rules). He had sold under bill No. 4268, dated 3rd March, 1966 medicine (Methol) for Rs. 69,640. This sale was included in the taxable turnover in the monthly return for the month of March, 1966 relating to the assessment year 1965-66 and the tax of Rs. 1,741 relating to the said sale was also remitted along with the return for the month. The goods sold under this invoice were returned to the assessee on 2nd September, 1966 and the assessee refunded the entire value of Rs. 69,640 plus sales tax of Rs. 1,741. In the monthly return relating to September 1966, which was filed in time on 25th October, 1966, the assessee claimed adjustment of the tax paid on this sale. The assessing officer, however, in the final assessment under rule 18 (6) relating to the assessment year 1966-67 rejected this claim for adjustment on the ground that under section 13 (5) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called the Act), the assessee would not be entitled to claim any adjustment of refund of the tax in respect of the sale of such articles after the expiry of the period of six months from the date of sale and that the assessee had claimed the adjustment only in the monthly return filed on 25th October, 1966 in respect of the turnover relating to September, 1966 and that therefore the adjustment was not made within six months from the date of sale, namely, 3rd March, 1966. This order of the assessing authority was confirmed in appeal by the Appellate Assistant Commissioner and the Sales Tax Appellate Tribunal also agreed with this view.

16. Under rule 15, every dealer who is liable to submit a return unless he has elected to be assessed under rule 18, shall on or before the 1st day of May every year submit to the assessing authority a return in form A-1, showing the actual total and taxable turnover in respect of the previous year. Under the Sales Tax Act the assessment year is the financial year, that is the year ending with 31st March. On receipt of such return, the assessing authority, if he is satisfied that the return is correct and complete, finally assesses on the basis of the return and determines the tax payable. In cases where he considers the return to be incorrect or incomplete he makes assessments according to 'best judgment' basis. In cases where the assessee had opted to be assessed by the method described in rule 18, the assessee had to submit a return in form A-2, on or before the 25th of every month in respect of the turnover for the preceding month. It may be seen from Form A-2 and the relevant rules that the return should specify the total turnover, the turnover on which exemption is claimed, the taxable turnover, the tax due on the taxable turn-

1. (1976) 37 S.T.C. 123: (1976) Tax.L.R. 1533 (Mad.).

over, the amount actually collected by way of tax and the tax paid. Along with this return, the assessee shall also send a cheque or postal order for the amount of tax due as per his return or a receipt for payment of the tax in a Government treasury.

The return so filed for each month is provisionally accepted, under Clause 3 of rule 18. For the monthly return so submitted without a treasury receipt or cheque for the full amount of tax payable, the assessing authority shall provisionally assess tax payable for the month on the basis of the return and shall serve upon the dealer a notice in Form B-2, and the dealer shall pay the sum demanded therein. After the close of the year in which the said monthly provisional assessment has been made, the assessing authority shall, after such scrutiny, as he considers necessary and satisfying himself that the monthly returns filed are correct and complete, finally assess under a single order on the basis of the returns and determine the tax or taxes payable under the Act for the year to which the returns relate. The provisions relating to the refund of any amount in respect of goods returned by customers will have to be understood with reference to this scheme of assessment.

17. Prior to the introduction of section 13 (5) in the Act, the legal position as per the provisions of the Act and the Rules and as understood by this Court in respect of the amount refunded for articles returned by the customers may now be noticed. Under section 3 of the Act every dealer shall pay tax for each year at a certain percentage of his taxable turnover. Turnover means the aggregate amount for which the goods are bought and sold and the taxable turnover means the turnover on which the dealer shall be liable to pay tax as determined by the provisions of the Act and the Rules. Taxable event is the sale and the levy of tax is on the 'amount' for which the goods are bought or sold. Once a sale takes place the amount for which the goods are sold becomes thus taxable. But the Act provided for certain relief in cases where the dealer had to refund any amount in respect of articles returned by the customers. *Explanation* (2) (iii) to the definition of 'turnover' in section 2(r) of the Act provides that, subject to such conditions and restrictions, if any, as may be prescribed in this behalf, any amount refunded in respect of articles returned by customers shall not be included in the turnover. In pursuance of this *Explanation*, rule 5-A specifies the conditions and restrictions.

The relevant portion relating to refund is rule 5-A (*b*) (i). Under this provision, all amounts refunded to purchasers in respect of goods returned by them to the dealer, when the goods are taxable on the amount for which they have been sold shall not be included in the total turnover, provided that the accounts show the date on which the goods were returned and the date on which and the amount for which refund was made or credit was allowed to the purchaser. Neither the *Explanation* to section 2 (*r*) nor rule 5-A (*b*) made the sale of the article which was the subject-matter of the return later on not a taxable sale by reason of such return only. Nor the definition of 'sale' in S. 2 (*n*) excluded such sales. Therefore, once a sale takes place the entire amount paid or payable in respect of the same is liable to be included in the turnover. Under the *Explanation* read with rule 5-A (*b*), the amount refunded in respect of articles returned by customers 'shall not be included' in the turnover.

18. In cases where the assessee has opted to be assessed under rule 18, as already stated, he has to submit a return in Form A-2 for every month on or before the 25th of the succeeding month and has also to remit the tax payable as per the return. Thus, when a sale takes place in any particular month, he had to include that sale in the taxable turnover in the monthly return and pay tax on it. If the return of the article was in any period subsequent to the sale but within the same assessment year the assessee would be entitled to deduct the same from the total turnover on which he is finally assessed under a single order for the assessment year under rule 18 (6), irrespective of the fact that the return was

within six months or beyond the period of six months from the date of sale. No question of excluding the sale itself from the original monthly return could arise. In respect of an assessment under rule 18, the words 'shall not be included in the turnover' in *Explanation* (2) to section 2 (*r*) and rule 5-A will, therefore, have to be understood only as a deduction from the total turnover.

19. In cases where the sale and return were in the same assessment year, when a dealer submits his return under rule 15, the amount for which it was sold is included in the turnover and the amount refunded is deducted from the same before arriving at the total turnover of the dealer because the sale is still a taxable sale in spite of the refund made on return of the article. In such a case, it is also immaterial whether the return of the article and the refund of the money was within a period of six months from the date of sale. Thus, even in respect of the assessment under rule 15, the words 'shall not be included in the turnover' will have to be understood only as a deduction from the total turnover.

20. As already stated under section 3 of the Act, every dealer shall pay tax at a certain percentage of his taxable turnover. Turnover is the amount for which goods are sold or purchased and taxable turnover is determined after certain deductions from the total turnover as per the rules. The amount refunded is excluded not because the sale and return took place in the same year but because section 2 (*r*) *Explanation* (2) allowed the amount refunded in respect of any goods returned to be deducted from the turnover of that year. The deduction from the turnover was not conditioned upon the inclusion of the amount for which the goods were sold in the turnover, but conditioned upon factual refund made on return of the goods and to the extent of amount refunded. Thus, what was relevant under *Explanation* (2) to section 2 (*r*) and rule 5-A (*b*) is the date of return of the article and refund of the money and not the date of sale. It may also be noted that the amount that is to be deducted from the turnover is not the entire price which the dealer receives on the sale from the customer, but it is only so much of the amount that was refunded by him when the articles were returned by the customer. The two amounts may differ, but so far as the assessment is concerned only that amount that was refunded had to be deducted.

21. Thus in terms of the provision of the Act and the Rules, the amount refunded has to be deducted only from the turnover of the year in which the refund was effected and it is immaterial when the sale took place and whether the price for which the goods were originally sold was included in the turnover or not. Thus, in cases where the sale and the return of the article were in two different assessment years, the assessee, as the provisions stood then, could claim a deduction of the amount refunded only in the assessment year in which the amount was refunded. He was not enabled to claim a deduction of the same in such a case in the assessment year in which the sale itself took place.

22. Let us now consider the decisions rendered with reference to the provisions then existing prior to the introduction of section 13 (5) of the Act. In *Devi Films (P) Ltd.* v. *State of Madras*[1], a Division Bench of this Court had to consider a similar question. The facts in that case are as follows: The assessee in that case sold some cinema machinery and apparatus under hire-purchase agreements. The aggregate of the amount due under these agreements was Rs. 68,275. In computing the taxable turnover of the assessee the aggregate amount was included in the year of the transaction and was assessed to sales tax. This was for the reason that the hire-purchase agreements were considered to be sales and the tax is payable on the aggregate amount for which the goods were sold, even though the consideration for the same was payable in future. When the purchaser defaulted in payment of the instalments, the assessee got a return of the goods. This default and return of the goods was in the assessment year 1955-

1. 12 S.T.C. 274 (Mad.).

56 long subsequent to the year of the transaction. The aggregate of the unpaid instalments in respect of these transactions was rupees 21,191-1-6."

The assessee claimed that since there was a return of the article and default in payment of the further instalments the entire amount of Rs. 68,275 which had suffered tax in the previous year should be deducted from its gross turnover in the assessment year 1955-56, during which period the agreements were terminated and the goods returned to the assessee. In support of this contention, the assessee relied on rule 5 (1) (*b*) of the then Turnover and Assessment Rules which was in *pari materia* with rule 5-A (*b*) of the present Rules. It may be mentioned that *Explanation* 2 (iii) of section 2(r) was also in the statute book at that time. It was held by this Court that the assessee was entitled only to that amount which represented the unpaid sale price and not the aggregate amount of Rupees 68,275 because it was only the unpaid sale price that would be the amount for which credit was allowed to the purchaser and the remaining consideration had already been received and not repaid by the dealer. It was also held that it was the year in which the refund was made or credit was allowed for which relief could be obtained and not the year of sale. In so holding, a Division Bench of this Court observed:

"The goods sold by the assessee were returned to the seller. It is true there was a considerable interval between the sale and the return of the goods, but the length of the interval is, in our opinion, not a relevant factor at all in deciding whether the requirements of the rule have been satisfied by a given assessee. If an allowance is made against the goods returned the deduction can be claimed only in the year in which that allowance has been made and to the real extent of that allowance, independent of the date of the sale. The rule itself makes that clear. The date of the sale decides the inclusion in the assessee's assessable turnover. The date of the allowance determines the exclusion from the gross turnover under rule 5 (1) (*b*)."

23. A similar view was also taken by the Andhra Pradesh High Court in *State of Andhra Pradesh* v. *Vauhini Pictures (P) Ltd.*[1], with regard to the effect of rule 6 (1) (*b*) (i) of the Andhra Pradesh General Sales Tax Rules, 1957, which also contained a provision similar to rule 5-A (1) (*b*) of the Tamil Nadu General Sales Tax Rules. In that case also some publicity materials were sold to the exhibitors in the assessment year 1957-58, but they were returned in the assessment year 1958-59 and the sale price was refunded by the assessee to the purchasers. Relying on the rule, the assessee claimed a deduction of the amount refunded in the assessment year 1958-59. A Division Bench of the Andhra Pradesh High Court allowed the claim and held:

"We find that rule 6 (1) (*b*) (i) discreetly omits to mention that the deduction claimed for refund of price in regard to the return of goods should be confined only to a particular period. All that rule mentions is that when goods are taxable on sales, the amounts allowed to purchasers in respect of the goods returned by the purchasers to the dealer is an allowable item. Further on the condition laid down in that rule (despite repetition) says 'provided the accounts show the date on which the goods were returned and the date on which and the amount for which refund was made'. It looks to us that the mention of the date is not with a view to find out when the claim for deduction has arisen, but only to make it feasible for the taxing authority to verify when the goods were got by the seller and how refunds were made in respect of them. Therefore, to have to read into this fact that the date of the return of the goods is to be specified by the assessee and that a revaluation in respect of the time of the transactions is also implied with a view to restrict deductions in the year of assessment is not

1. (1952) 13 S.T.C. 847 (A.P.).

warranted by the language of this Rule. Nor can it be said that this Rule was contemplating the taking into account of the return of the goods only in the assessment year and not in regard to goods sold out previously but were returned in the assessment year."

The resultant position is, when a sale takes place the amount for which it is sold or purchased will have to be included in the turnover in the year in which the sale took place. By reason only of the return of the article subsequently and refunding of any amount in respect of such return, the sale itself does not cease to be a taxable sale nor the amount for which it was sold cease to be a turnover of the assessee. In the case of refund in respect of articles returned by the customers, that portion of the amount that was refunded will have to be deducted from the turnover of the year in which the amount was refunded. It was not permissible for an assessee when the sale and return were in different assessment years, to claim deduction and relief in the year of sale itself. When such was the position section 13 (5) of the Act was introduced by Madras Act XV of 1964. That sub-section as orginally introduced reads thus:

"(5) Where a dealer has refunded the price of articles returned by customers together with the tax collected from such customers in respect of the sale of such articles and where the amount representing the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale, within a period of six months from the date of sale by adjustment in the assessment and the final assessment shall be completed accordingly but such dealer shall not be entitled to claim any adjustment or refund of the tax in respect of the sale of such articles after the expiry of the said period of six months."

As Craies on Statute Law puts it, the most firmly established rules for construing an amending enactment are those laid down by the Barons of the Exchequer in Heydon's case, 1584-3, Co-Rep. 7a which have been continuously cited with approval and acted upon in a number of cases. They are as follows:

(1) What was the law before the making of the Act; (2) what was the mischief and defect for which the existing law did not provide; (3) what remedy the Legislature had resolved to cure; and (4) the true reason of the remedy. The reason for the addition of sub-section (5) of section 13 of the Act is explained in the Statement of Objects and Reasons to the amending bill and it reads as follows:

"Under *Explanation* 2 to the definition of 'turnover' in section 2 (*r*), any amount refunded in respect of articles returned by customers shall not be included in the turnover of a dealer. But when such articles are sold by a dealer at the close of a financial year, and customers return those articles and obtain refund of the price from the dealer sometime after the close of that year, the dealer is unable to exclude the amount of the price so refunded by him from his turnover before he furnishes his return for that year. It is considered necessary that he should be enabled to claim deduction of the tax included in his assessment in respect of the sale of such articles. It is not, however, considered necessary that a dealer should have the benefit of claiming such deduction of tax or refund of such tax for any indefinite period. It is accordingly proposed to amend section 13 of the said Act to allow adjustment of the amount of such tax in the assessment only if the dealer makes his claim within a period of six months from the date of sale."

It is seen from this that the Legislature intended to provide for that which was not found in the earlier enactment, that is to permit an assessee to claim a deduction of any amount refunded from the turnover of the assessment year in which the sale took place even though the refund was made in subsequent financial year. The provision in section 13 (5) also shows that it applies only to a case where the assessee wants to claim a deduction of the amount refunded from the

turnover of the year in which the sale took place, even though the refund was in the subsequent year. The words 'the amount representing the price refunded by the dealer is included in his turnover' in section 13 (5) clearly show that the turnover referred to therein is the turnover of the year in which, the sale took place. The relief under section 13 (5) could be claimed by the dealer only if the claim for deduction of the tax levied in respect of such sale is made within a period of six months from the date of sale. A curious result flowed from this provision, as seen below. Even if the sale and the return were made in the same assessment year, in the case of a person who had opted to be assessed under rule 18, he was deprived of the relief found in *Explanation* (2) to section 2 (*r*), because if the sale was in April it would have been included in the monthly return filed in the subsequent month and on that basis it would have been provisionally assessed. Though the return and refund itself might be within six months, that is, in October, since the monthly return in respect of October is to be submitted in November, the assessee, on a strict interpretation of section 13 (5) was not entitled to claim deduction of the tax by adjustment. In the case of an annual return under rule 15 also the assessee would not be entitled to claim deduction though the sale and return were in the same year since section 13 (5), as it was originally enacted, required the claim for deduction or adjustment to be made within a period of six months from the date of sale. In all cases where the sale took place during the period from the 1st April and 30th September of any particular year, the assessee was not able to invoke section 13 (5) as the return for the year had to be filed after the end of the year and before the 1st of May. It is to get over this difficulty, section 13 (5) was again amended by Tamil Nadu General Sales Tax (Second Amendment) Act, 1972, by substituting the words 'within such period as may be prescribed' for the words 'within a period of six months from the date of sale' and rule 5-B was also introduced in the Rules. Under rule 5-B such claim for adjustment or refund of tax could be made within a period of six months from the date of sale or before the date of final assessment whichever is later. Under the provisions of section 13 (5) and rule 5-B, as they stand now, if the sale and the return take place in different assessment years, the assessee could claim a deduction of the amount refunded from turnover of the year in which the sale took place before the date of final assessment for that year.

Even if the assessment had been completed, he could ask for an adjustment or reopening of the assessment or rectification of the assessment if he makes a claim for such adjustment or rectification within a period of six months from the date of sale itself. This is the position both in regard to assessment under rule 15 or an assessment under rule 18. Thus, section 13 (5) is not intended to cover a case where the assessee claims a deduction of the amount refunded in the year in which he refunded the money. It is intended to cover a case when the assessee claims deductions of the amount refunded from the turnover of the year in which the sale took place. The previous provision enabling the assessee to claim deduction under section 2 (*r*), *Explanation 2* (iii) read with rule 5-A (*b*) in the year in which the refund was effected is thus not affected either by express provision or by implication. It may also be pointed out that it is not correct to state that it is rule 5-A (*b*) that enables an assessee to deduct the amount from the turnover. It is provided for in section 2 (*r*) *Explanation* itself and rule 5-A only prescribes the condition under which such deductions could be claimed, as *Explanation 2* itself states that the deduction could be made only subject to such conditions and restrictions as may be prescribed.

24. Before parting with this case, I may also add that, assuming that the view of the learned Chief Justice is also possible, under the well-known principle where two interpretations are possible that interpretation which is beneficial to the assessee will have to be adopted in construing a taxing statute. Even under this rule, I am of the view that decision in

Madras Radiators and Pressings v. *State of Tamil Nadu*[1], does not require any reconsideration.

25. I am therefore unable to share the view that the earlier decision of this Court in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], is erroneous or unsupportable on the provisions of the Act.

Balasubrahmanyan, J. (majority view).—I have had the advantage of perusing the judgments of my Lord the Chief Justice and of my learned brother V. Ramaswami, J. They have expressed diametrically opposite views on the scope and effect of section 13 (5) of the Tamil Nadu General Sales Tax Act, 1959. I agree with the former view and disagree with the latter. In these events, I propose to say a few words myself on the question, explaining why I prefer the one view to the other.

27. Section 13 (5) deals with the tax treatment of a sales return for purpose of assessment. The Act imposes a tax on sales of goods. The charge to tax, in terms of legislative competence as well as in terms of some of the provisions in the Act itself, attaches the moment the sale is effected. This idea is sometimes put differently by saying that in sales tax the taxable event is the sale. But the Act has also to look to the process of assessment and collection of this tax. Hence it adopts the principles of aggregation familiar to fiscal measures and makes the assessment to tax a yearly assessment by aggregating all sales that a taxpayer makes in the course of that year. The aggregate of the sales in the fiscal period of one year is called the turnover. This is the reason why sales-tax also goes by the other appellation, turnover tax. It would be correct to say that the tax is at once a tax on the sales and a tax on turnover. There are sections in the Act which are oriented towards the one conception of aggregation; there are other sections which are founded on the other idea of severalty of transactions. It is unnecessary for me to refer to all the relevant sections that illustrate the scheme of the Act which I have outlined. Section 13 (5) is one of those provisions in the Act which takes up for special treatment an individual sale, which forms part of the aggregate of sales called turnover. Any transaction which is sale and is part of the taxable turnover of a year gets taxed, and must get taxed, in the assessment for that year. The Legislature, however, as a popular legislative body took note of the realities of commercial dealings, because the tax imposed under the Act is not a tax on sales of all and sundry people, but only a tax on the turnover of a dealer, all non-dealer's sales being excluded from the ambit of the charge by definition. It often happens in the business world that a customer who has purchased a commodity from a dealer might wish to return it for some reason, and the dealer may also be agreeable to that course and be willing to refund the price. If both the parties act according to their second thoughts in the manner aforesaid, what happens is a sales return, as it is described in the fiscal jargon. But this does not abrogate the sale, or render it retrospectively, a nullity. On the contrary, it takes note of the circumstances that the earlier sale is an accomplished fact. Only, the parties agree to put themselves in the former position, the *status quo ante*, by consensual overt acts—the one returning the goods and the other refunding the price.

Technically therefore, on the theory that sales tax attaches at the moment of sale, there is no call for making any provision in the taxing Act for giving any relief to the dealer whose sale, which is subject to a subsequent return, chargeable to tax. But as I said, since the Legislature felt it expedient to take note of commercial realities even while enacting a strictly fiscal measure, it made provision for excluding from the taxable turnover the amount refunded by the dealer to the customer as respects a sales return. Sales return, as such, has thus no place in the scheme of taxation excepting that it can be traced to the particular sale of which it is a return. Section 13 (5) makes this clear by enacting that where

1. (1976) 37 S.T.C. 123: (1976) Tax.L.R. 1533 (Mad.),

a dealer has refunded the price of articles returned by customers and where the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale. The words of the section are not capable of being misunderstood. They hitch the deduction of tax to the sale in question. There can be no question of considering a sales return all by itself, as if that, *per se*, were the subject of special tax treatment. The other provision in the section, which is very important to the present case, is that which imposes a strict time-limit for the making of any claim by the taxpayer for deduction of the tax referable to the sale in question. While the Act permits the dealer to get a deduction of tax in respect of the sales return, it insists that the claim for such deduction should be made within six months from the date of the sale.

If, by then, the assessment of the turnover in which the sale is included, is not completed, then an adjustment will be made in the computation of the taxable turnover by removing the amount covering the sales return from the figure of turnover, and the year's tax will be calculated on the net figure after exclusion of the amount of sales return from the turnover. The section having provided the six months time-limit for deduction of tax in respect of sales return, logically makes provision for cases where, even during the subsistence of the six months' time-limit, the final assessment happens to have been already completed. In such cases, the section entitles the dealer to obtain relief by way of refund of the tax levied in the already completed assessment, but always insisting that the claim for deduction of tax must be filed before the assessing authority within six months of the sale.

28. I do not think the scheme and structure of the section admit of any doubt. I further feel that in the matter of the tax treatment of sales returns this provision must be taken as a complete Code in itself. This conclusion must be derived not only because there is no other section in the Act which has anything to say on the subject, but also because of enactment of an inexorable time-limit in the concerned provision itself. The idea of a time-limit for exercise of a right or privilege is to say that beyond the time-limit the right or privilege cannot be exercised. Otherwise, the Legislative purpose of imposing a bar would be stultified. For these reasons, without referring to the history of the legislation or any other factors, I am of the view that the claim for deduction of tax for a sales return cannot be made at any time, after the expiry of six months from the relative sale itself. I am further of the view that the claim appertains, and must appertain, only to the particular assessment of the turnover in which the sale itself figures.

29. Reference was made to rule 5-A (*b*) (i) of the Rules made under the Act. Reference was also made to the definition of the expression 'taxable turnover' and 'turnover' in the interpretation clauses in the Act. The former term is defined as the turnover on which a dealer shall be liable to pay tax as determined after making such deduction from his total turnover and in such manner as may be prescribed. The latter expression 'turnover' has a definition to which are appended explanations. *Explanation* (*iii*) says that, subject to the rules in this regard, any amount refunded in respect of articles returned by customers 'shall not be included' in the turnover. Rule 5-A (*b*) (i) refers to all amounts refunded to purchasers in respect of goods returned by them to the dealer, and provides that the said amounts shall not be included at the total turnover of the dealer.

30. From the words 'shall not be included' occurring in the definition in section 2 (*r*) read with *Explanation* (*iii*) and rule 5-A of the Rules, it is sought to be argued that whenever there is a sale return the amount covered by that return can be deducted from the turnover for arriving at the taxable turnover. It is principally on the basis of these words that the view has been expressed in the judgment of my learned brother, V. Ramaswami, J. These words, it is said,

warrant the taxation of a sale in one year's assessment and the exclusion of the sales return in respect of that very sale in a subsequent year's assessment. With respect, I do not see how the words point to this conclusion. Ramaswami, J., has observed that the words 'shall not be included' only mean that to the extent of the sales return there shall be a 'deduction' from the turnover. In my view, the concept of a deduction in the sense of an allowance such as we know in the realm of income-tax for business expenditure, is alien to the scheme of the Tamil Nadu General Sales Tax Act. 'Shall not be included' does not mean shall be deducted. Nor does it mean, shall be excluded. In my opinion the words "shall not be included" convey the idea that but for the provision for non-inclusion the thing would be included in the turnover.

Samuel Goldwyn the movie Mogul in a famous Goldwynism asked his host to 'include me out' from the list of invitees. Adopting this Goldwynism I would say that a sale return is such a return as might be included out of the taxable turnover. In other words, only those sales returns whose relative sales, but for their non-inclusion, are includable in the very assessment of the turnover concerned can be kept out of the taxable turnover. It follows, therefore, that even on the basis of the statutory definitions of turnover and the pertinent rule relating to non-inclusion of sales returns, there is no warrant for the conclusion that a sales return may be claimed in any assessment year, provided the return is made in that year.

31. In the earliest Bench case on the subject in *Devi Films (P) Ltd.* v. *State of Madras*[1], which was under the earlier Sales Tax Act of 1939, the position was somewhat epigrammatically put: the year of assessment is the year of sale, but the year of exemption for sales return is the year of return. The concerned rule that the Bench had to construe employed the expression 'shall be deducted from the gross turnover'. The words we are dealing with are different, as I have sought to show in the foregoing paragraphs. It is not necessary, and no purpose would be served, to examine whether *Devi Films (P.) Ltd.* v. *State of Madras*[1], even on the language of the statute or the statutory rules as they then existed, was correctly decided in the epigram I have referred to above. It is necessary to emphasise that under the 1959 Act, after the inclusion of section 13 (5) all the law and principles for the tax treatment of sales returns must be found only in that section and nowhere else in the Act. Rule 5-A cannot bear the meaning sought to be given to it that irrespective of the bar of limitation under section 13 (5) a dealer would be entitled to tax deduction in respect of a sales return. To permit a dealer to obtain a deduction, as it is called, from a later year's assessing turnover for a sales return appertaining to an earlier year's sale would amount to a failure to tax a taxable sale of the last year.

32. The above principle can be borne out by an illustration. Sales of commodities A, B, C and D of Rs.10,000 each are made in 1975-76. In 1976-77, there are sales of E, F, G and H of Rs.10,000 each. In that year commodity A is returned and the dealer refunds the price to the customer. In terms of section 13 (5) the claim for the sales return must be made in 1975-76 assessment to which the sale of A appertains. To say that in 1976-77 Rs.10,000 can be deducted would be equivalent to leaving out of account from proper charge of tax any one of the sales of E, F, G. and H. I do not find any warrant in the words of rule 5-A (*b*) (i) to desist from taxing a sale which falls within the charge. The exclusion of a sale return must, therefore, be strictly confined to the very year in which the sale itself has been effected and would otherwise have had to be included and charged to tax.

This is the principle and provision in section 13 (5). When the section uses the words 'deduction of tax', which, so

1. (1961) 12 S.T.C. 274 (Mad.).

1. (1961) 12 S.T.C. 274 (Mad.).

far as I can see, is a new phrase in sales tax literature; it is implicit that only that tax with which the sale itself is charged, or would be charged, is the subject of tax relief.' It is in this context that section 13 (5) provides for adjustment of tax in the assessment in cases where the claim for deduction of tax is made before the assessment is over, although within six months of the turnover. It is on the same principle that section 13 (5) provides for actual refund of tax—another innovation introduced by the Amendment Act of 1964—whenever the claim is made after the sale gets completed, but within six months of the sale.

33. It was suggested that section 13 (5), occurring as it does in the section marginally noted as 'provisional assessment', must be confined to provisional assessments. A marginal note, made by the legislative draftsman before the amendment, but omitted to be altered suitably after amendment, cannot be a proper basis for statutory construction. Vide *Commissioner of Income-tax* v. *Bhogilal Lalchand*[1] and *Commissioner of Income-tax* v. *Ahmedbhai Umarbhai & Co.*[2] The words of section 13 (5) are clear enough, and I have already explained why they should be regarded as a complete Code in themselves on the subject of tax relief to sales returns.

34. Reliance was placed on a supposed rule of construction of taxing Acts that where two views are possible of a fiscal provision the more favourable to the taxpayer should be held to be the correct interpretation. As a student of revenue law, I have never been able to understand the rationale behind this doctrine of interpretation of fiscal enactments. In any case, I cannot accept the validity of a doctrine of judicial construction the last resort of which is doubt, not conviction. Recent trends in tax decisions show the decline of this theory of interpretation. Forensic ingenuity might be capable of raising a cloud or doubt in the most unequivocal of taxing provisions. But whatever doubts might be created in other people's minds, the Court at any rate must be in a position to make up its mind in every case. That is because, while there may be a possibility of more than one construction being mooted of the same taxing provision, there can only be one view that can be correct. In any case, in expressing my views aforesaid I have not been assailed by any doubts whatsoever.

35. For the above reasons, I concur with the conclusion expressed in the judgment of my Lord, the Chief Justice and differ from that expressed by my learned brother V. Ramaswami, J. In my view, the Division Bench decision in *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], is wrongly decided.

ORDER:

Kailasam, CJ.—In accordance with the opinion of the majority of the Full Bench, it is held that *Madras Radiators and Pressings* v. *State of Tamil Nadu*[1], has been erroneously decided.

37. In the result, the tax case is dismissed. There will be no order as to costs.

S.J. —— *Revision dismissed.*

1. 1954 S.C.J. 122: 1954 S.C.R. 444: 25 I.T.R. 50: A.I.R. 1954 S.C. 155.
2. 1950 S.C.J. 374: 1950 S.C.R. 335: 18 I.T.R. 472: A.I.R. 1950 S.C. 134.

1. (1976) 37 S.T.C. 123: (1976) Tax.L.R. 1533 (Mad.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and Ratnavel Pandian, JJ.*

M. S. Dharma Raja and others .. *Appellants**

v.

M. K. Rama Ammal and another .. *Respondents.*

Hindu Law—Dedication for religious and charitable purposes—Essentials — Complete dedication or charge only—Deed—Construction.

A dedication of properties for religious or charitable purposes must be either absolute or partial. In the former case, the properties are given out and out to an idol or to a religious or charitable institution and the donor diverts himself of all beneficial interest in the properties comprised in the endowment. In the latter case a charge is created on the properties comprised in the endowment or there is a trust to receive and apply a portion of the income for the religious and charitable purposes. In such a case the property descends and is alienable and partible in the ordinary way, the only difference being that it passes with a charge upon it. [*Para* 22.]

The mere execution of a deed of gift or an instrument is not enough to constitute a valid endowment. It is necessary that the executant shall divest himself of the properties. There must be a transfer of the apparent evidences of ownership from the donor to the donee and in cases where there is no real dedication of properties but only a creation of perpetuity in favour of one's own descendants, the alleged gift in favour of the idol or religious or charitable institution becomes void. This position of law is clearly laid down in various decisions. [*Para.* 23.]

Held that, in the instant case, there was no separate account for the so-called trust properties. The income and expenditure for these properties were either in common account books which related to other properties as well as the properties covered under the document in question. The clubbing of the income of the properties would also be in the circumstances indicative of the fact that there was no divesting of the interest or rights in those properties and so there was no absolute or total dedication of the properties. [*Para.* 25.]

Cases referred to :—

Raj Bajrang Bahadur Singh v. *Thakurani Bakhtiraj Kuer,* 1952 S.C.J. 655 : (1953) 1 M.L.J. 108 : 1953 S.C.R. 232: A.I.R. 1953 S.C. 7; *Monakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao,* 1957 S.C.J. 835 : 1957 S.C.R. 1122: (1957) 2 An.W.R. (S.C.) 175 : (1957) 2 M.L.J. (S.C.) 175 : A.I.R. 1957 S.C. 797; *Nirmala Bala Ghose* v. *Balachand Ghose,* (1966) 2 S.C.J. 426 : (1965) 3 S.C.R. 550 : A.I.R. 1965 S.C. 1874; *S. Shanmugham Pillai* v. *K. Shanmugham Pillai,* (1973) 2 S.C.C. 312 : A.I.R. 1972 S.C. 2069; *M. Kesava Gounder* v. *D. C. Rajan,* (1976) 1 M.L.J. 56 : 89 L.W. 205 : A.I.R. 1976 Mad. 102.

Appeal No. 85 *of* 1973:

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram at Madurai, dated 13th February, 1973 and passed in Original Suit No. 73 of 1969.

C.M.P. No. 996 *of* 1976.

Petition praying that for the reasons stated in the affidavit filed therewith the High Court will be pleased to bring on record (1) Poovammal, (2) B. Rajagopal, (3) B. Sarada and (4) P. A. Muthulakshmi as Appellants, 10, 11, 12 and 13 as the L.Rs. of the deceased 2nd Appellant in the said Appeal No. 85 of 1973.

C.M.P. No. 996 *of* 1976.

Petition praying that for the reasons stated in the affidavit filed therewith the High Court will be pleased to record the Appellants 1 and 2 as L.Rs. of the First Respondent namely M. K. Rama Ammal in the said Appeal No. 85 of 1973.

*Appeal No. 85 of 1973 and C.M.P. No. 996 and No. 997 of 1976, *21st September,* 1977.

R. Nadanasabapathi and *R. Damodaran*, for Appellants.

N. S. Varadachari, for Respondents.

The Judgment of the Court was delivered by

Ratnavel Pandian, J.—Defendants 1 and 3 to 10 in O.S. No. 73 of 1969 on the file of the Court of the Subordinate Judge of Ramanathapuram are the appellants herein.

2. The suit was filed by the respondents-Plaintiffs for partition and separate possession of an 1/6 share in the plaint A and B schedule properties in favour of the second plaintiff or in the alternative for directing framing of a scheme for the effective management of the plaint-A schedule properties, making due provision for the participation of the second plaintiff therein and for his receiving an 1/6 share in the surplus income and also directing the division of the plaint B Schedule properties and delivering an 1/6 share therein to the second plaintiff: (2) for directing the defendants to render a true and proper account for the income derived by them from 13th June, 1967 from the plaint A schedule properties and also as regards the sale proceeds of the third item in the schedule attached to the trust settlement deed, dated 13th July, 1931 (Exhibit B-1) and for due payment of the plaintiff's 1/6 share therein to the second plaintiff, and (3) for a permanent injunction restraining the defendants and their men from leasing out or cutting the teakwood plantations in item-1 of the A schedule properties without reference to the plaintiffs, and for costs of suit.

3. The plaint allegations may be briefly stated as follows: The plaint A schedule properties, items 1 and 2, are situate in the villages of Ayan Kollankondar and Vadakku Venganallur, Srivilliputhur Taluk, and the plaint B schedule properties are in Melapattam, Karisalkulam, Sammandapuram, Rajapalayam and Pudupalayam, Srivilliputhur taluk. The said properties belong to the families of the plaintiffs and the defendants. The common ancestor of the parties was one M. R. Subba Raja, son of Ramaswami Raja. For the purpose of better understanding of the relationship of the parties, the following genealogical tree may be usefully referred to:—

RAMASWAMY RAJA
- M. S. SUBBA RAJA
  - M. S. Ramaswamy Raja (Died),
    - M. R. Subba Raja (4th Defendant)
  - M. S. Muthaiya Raja (Died)
    - Adopted son - M. M. Raghupathi Raja (5th Defendant)
  - M. S. Annamma Raja (died unmarried)
  - M. S. Dharma Raja 1st Deft.)
    - M. S. D. Chandrasekhara Raja
    - A. K. D. Subbulakshmi
  - M. S. Krishnama Raja (died) wife M. K. Rama Ammal (1st Plff.) (died on 5-4-'75)
    - M. K. Venkateswara Raja (2nd Plff.) (adopted son)
  - M. S. Kumaraswamy Raja (2nd Deft.) (since dead) =wife M. S. K. Seethal (D.10)
    - M.K. Raghava Raja (7th Deft.)
    - M. M. Raghupathy Raja
    - M. K. Sankara Raja (8th Deft.)
    - P. J. Padma (9th Deft.)
  - M. S. Bheema Raja (dead) (3rd Deft.)
    - M. S. Balasubramaniam Raja (6th Deft.)

It will be found from the above that defendants 1 to 3, late Ramaswamy Raja (father of the 4th defendant), one Muthaiya Raja (adoptive father of the 5th Defendant), late Krishnama Raja (husband of the first plaintiff and adoptive father of the2nd plaintiff) and another Annama Raja were the sons of the said Subba Raja. The 6th defendant is the eldest son of the third defendant. The said Subba Raja had, by Exhibit B-1 dated 13th July, 1931, a so-called trust deed, set apart the plaint A schedule items (1-A), 2 and 3 for the purposes mentioned therein, with the direction that out of the income derived from the said properties, the settlor, his sons and their descendants, should perform during the month of *Purattasi* every year, *Thirumanjanam*, *Sahasranama Archana* and *Neivedyam* to Lord Venkatachalapathi Swami of Thiruvannamalai, near Srivilliputhur, at an expense of Rs. 25 and that after the demise of the settlor and his wife Lakshmi Ammal, it should be performed at an expense of Rs. 25 per annum on each of their annual *Shradha* days. The balance of income from the properties after meeting the kist and other expenses, should be equally divided between all his seven sons and their descendants. The document, for this purpose, recited that the settlor should be the trustee during his lifetime, and thereafter his seven sons and their male descendants should be the trustees and manage the trust by annual rotation. It was further provided that in case his sons or their male descendants did not have any male issue of their own or if any body is adopted by them outside the family, the adopted son would not have any right to the trusteeship or to any share in the surplus income. The plaintiffs submit that the said document was evidently executed only with a view to tie up the said items 1 (*a*) and 2 of plaint A schedule in the family in perpetuity and that the trust is an illusory one, and that there was no real dedication of the properties in favour of the trust. Even on the date of the execution of the deed, the net annual income from items 1 to 3 was not less than Rs. 3,500 and the expenses towards annual *kist*, *kaval* expenses and agricultural expenses came to not more than Rs. 400 per annum and therefore since the amount to be expended towards the trust was only Rs. 75 there was really no objection on the part of the settlor to dedicate the properties for the said trust and it was only a device to tie up the properties in the family in perpetuity. According to the plaintiffs, the other terms and conditions incorporated in the said document are all invalid and inoperative and cannot affect the right of the plaintiffs or the other descendants of the settlor since the scheme of succession laid down in the said document is opposed to law. Out of the seven sons of the settlor Subba Raja, his second son Annama Raja died unmarried and consequently his remaining other five sons and the 4th defendant, who is the son of his deceased son Ramaswami Raja, have been enjoying the properties by dividing the income therefrom after performing the trusts enumerated in the said document. Subsequently, his third son Muthiah Raja died leaving behind his adopted son, the 5th defendant herein, who has ever since been receiving his share of the income. M. S. Krishnama Raja, husband of the first plaintiff and the adoptive father of the 2nd plaintiff, died on 13th June, 1967 leaving behind the plaintiffs alone as his heirs. Since then, according to the plaintiffs, defendants 1 to 5 have been wrongfully refusing the plaintiffs their due share in the surplus income derived from the plaint A schedule properties on the basis of the terms and conditions of Exhibit B-1 mentioned above. The 6th defendant, who is not a trustee even according to the terms and conditions of Exhibit B-1, is allowed to manage the plaint A schedule properties by defendants 1 to 5 and he is in management thereof since 1967 ever since the death of Krishnama Raja. Now, the plaintiffs submit that since the properties are not trust properties, the defendants have no right to deny the plaintiffs their share in the plaint schedule properties. Though the plaintiffs made a demand in February-March, 1969 for partition of the properties, they

have been evading to do so. While so, the first plaintiff has now executed two settlement deeds, one on 20th December, 1967 (Exhibit A-4) and another on 16th June, 1969 (Exhibit A-5), conveying her interests in the properties in favour of the 2nd plaintiff and consequently the 2nd plaintiff is now entitled to an 1/6 share in the properties. Consequent to the execution of Exhibit B-1 and after the demise of the settlor, his seven sons have added some more items of properties to the so-called trust in their registered partition deed dated 15th May, 1939 (original of Exhibit A-2) which are described in the 11th Schedule thereto. According to the plaintiffs, the said item was fetching not less than Rs. 150 per annum even on that date and the amount directed to be expended towards the trust was only Rs. 20 per annum, thus making it clear that even the said item was not absolutely dedicated to the trust, but was only burdened with the trust and therefore the said item is also liable to be divided between the parties, the plaintiffs' share being 1/6. The family of the parties was entitled only to a half share in the properties comprised in the 11th schedule to Exhibit A-2 since the other half belonged to one T. A. K. Alaga Raja's family. In the partition subsequently entered into between the sons of Subba Raja and the family of Alaga Raja, the properties described in item 1 (*b*) of plaint A schedule have been allotted to Subba Raja's son. Pursuant to the said allotment, the properties in the plaint A schedule item 1 (*b*) have been incorporated in the so-called trust framed by Subba Raja. There cannot be any objection to the relief of division of plaint B schedule properties since the said properties have been set apart to be enjoyed in common between the parties in Exhibit A-2 and the plaintiffs are also in joint possession of the said items along with the defendants. So far as the plaint A schedule, item 3, is concerned, it was subsequently disposed of by the members of the family and the sale proceeds amounting to Rs. 6,000 is now remaining in the hands of the defendants and therefore they are bound to render proper accounts with regard to the said amount. They are equally bound to render accounts with regard to the income derived from the plaint A schedule items 1 and 2 since the death of Krishnama Raja, *viz.*, 12th June, 1967 and give the plaintiffs an 1/6 share therein. The defendants, after ignoring the protest and demand of the plaintiffs, have leased out a portion of the plaint A schedule item 1 on 19th March, 1969 for cutting teakwood trees to third parties and are trying to lease out the teakwood plantations in the remaining portion and secrete the lease amount to themselves. In the circumstances, the plaintiffs seek a permanent injunction restraining the defendants from leasing out the teakwood plantation or cutting the same. In case the plaint A schedule properties are found not to be partible, the plaintiffs pray the Court to frame a scheme in regard to the management of the said items making due provision for their participation in the management of the trust and for the payment of their 1/6 share in the surplus income therefrom. Hence the suit.

4. Defendants 1 to 3 filed a written statement contending as follows:—The plaintiffs' suit for the various reliefs is not maintainable. They do not admit the correctness of the particulars, the description and value of the properties in the plaint A and B schedules. They deny the correctness of the genealogical tree appended to the plaint. They deny that the 2nd plaintiff is the adopted son of Krishnama Raja whose widow is the first plaintiff. The defendants deny the plaint allegations regarding the terms and conditions of the trust deed and the income from the properties etc. According to the defendants, late Subba Raja, the founder of the trust, and his wife were pious people. Subba Raja had a very large extent of self-acquired properties and he executed the trust deed Exhibit B-1 in respect of a small extent of his self-acquired properties. The terms and conditions of this document were faithfully followed and complied with by the defendants and the husband of the first plaintiff

as well. In Exhibit A-2, they have, clearly mentioned about the trust deed. Though it is true that Krishnama Raja died on 13th June, 1967, leaving behind his widow, the first plaintiff, it is false to state that the 2nd plaintiff is the adopted son of Krishnama Raja. There was no valid adoption and therefore the 2nd plaintiff cannot become a trustee of the said trust and he cannot be a beneficiary of the trust. Even assuming without admitting that the 2nd plaintiff is the adopted son of Krishnama Raja, he cannot succeed to the trusteeship as per the conditions laid down in the trust deed Exhibit B-1. As the 6th defendant's father is not able to effectively manage the affairs of the trust, the 6th defendant is representing the trustees; but by this fact the 2nd plaintiff cannot claim any right to the trust. In the circumstances, the plaintiffs cannot have an 1/6 share in the trust properties. The allegation about any demand made in February, 1969 for a share in the properties is false. Further, the two settlement deeds dated 20th December, 1967 and 16th June, 1969 executed in favour of the 2nd plaintiff by the first plaintiff cannot confer any right in respect of the trust over the second plaintiff. The allegation that the properties in item 3 of plaint A schedule are not endowed or dedicated for the purpose of the trust created by late Subba Raja is false. The plaintiffs cannot claim any share in the said properties also. According to the defendants, the plaint B schedule properties are not trust properties. They have been added to the present suit by the plaintiffs only to give a colour to their false claim in respect of the trust and its properties. As they are not divisible the said properties are kept common along with the other properties under schedule-8 to the partition deed Exhibit A-2. Most of the properties therein have been already sold by the sons of Subba Raja after partition. The remaining properties in the said B schedule are lying fallow, deriving no income. The particulars of the properties in the B schedule are not correctly given. The first plaintiff has got only a 1/7 share in the said properties, since one of the sons of Subba Raja, *viz.*, deceased Annama Raja bequeathed his share to the fourth defendant and his wife, and in the circumstances the defendants have no objection for the first plaintiff's getting 1/7 share in the said properties. As per the wishes of the founder of the trust, item 3 of the plaint A schedule, which was described as item 3 in the trust deed, has been already sold for purchasing properties in favour of the trust. Since suitable properties were not available, the sale proceeds have been invested in the Subba Raja Ginning Factory at Rajapalayam and the amount is fetching interest. Regular accounts are maintained in respect of the trust and they are checked and verified periodically by all the trustees including Krishnama Raja and they have been found correct and as such there was no mis-management. Since they are endowed to the trust, they cannot be divided. The plaintiffs cannot question the lease of item 1 of plaint A-schedule. The small trees growing in Pattukadu *viz.*, item 1 of plaint A schedule, have to be leased out periodically for cutting the same for firewood and other purposes and it has been so done periodically from the time of the founder of the trust. One such public auction was held on 19th March, 1969 in respect of 10 acres 33 cents and another auction on 6th July, 1969 in respect of 53 acres 65 cents in item 1 of A-schedule for reasonable lease amount and therefore the plaintiffs cannot have any relief of injunction. In the above circumstances, the plaintiffs have no cause of action to file the present suit. The suit has been filed at the instigation of one Ramaswami Raja, sister's husband of the first plaintiff and father of the second plaintiff, who has got some grudge against the family members of Subba Raja and who is not on talking terms with the defendants. Hence the suit should be dismissed with costs.

5. Defendants 4 to 6 have adopted the written statement filed by defendants 1 to 3.

6. Defendants 7 to 10 have only reiterated the contentions raised by defendants 1 to 3.

7. The 5th defendant filed an additional written statement disputing the correctness of the survey numbers and the extent of some of the suit properties.

8. On the above pleadings, the following issues were framed for trial:

1. Whether the A-schedule properties attached to the plaint have not been absolutely dedicated for the trust or are they merely burdened with the trust?

2. If the A-schedule properties are partible, to what share are the plaintiffs entitled therein?

3. Whether the plaintiffs are entitled to any share in the surplus income from A-schedule properties even if they are found to be trust properties and as such not partible?

4. Whether the 2nd plaintiff is the adopted son of the late M. S. Krishnama Raja?

5. Whether the 2nd plaintiff is not entitled to any interest in the A-schedule properties as contended by the defendants?

6. Whether the settlement deeds dated 20th December, 1967 and 16th June, 1969 executed by the 1st plaintiff in favour of the 2nd plaintiff are true and binding on the defendants?

7. Whether the plaintiffs are entitled to have a scheme framed for the management of the A-schedule properties and division of surplus profits therefrom even if they are found to be trust properties?

8. Whether the plaintiffs are entitled to the relief of injunction restraining the defendants, their men and agents from leasing out the trees in A-schedule properties without reference to them?

9. Whether the defendants are liable to render accounts to the plaintiffs for the income derived from the said properties from 13th June, 1967 and also for the sale proceeds of A-schedule item 3?

10. What is the share to which the plaintiffs are entitled in B-schedule properties?

11. Whether the leases of the trees in 10 acres and 37 cents on 19th March, 1969 and another extent of 53 acres and 63 cents on 6th July, 1969 in A-schedule in item No. 1 by the defendants are true and valid and binding on the plaintiffs?

12. To what reliefs are the plaintiffs entitled?

13. Whether the defendants 9 and 10 have no right in the A-schedule property or in the office of the trusteeship?

14. Whether the plaintiffs are entitled to partition and separate possession of 1/6th share in all or any of the suit properties?

9. Even at the outset, it may be mentioned that the learned counsel appearing for the plaintiffs in the lower Court made an endorsement on the plaint to the effect that the second plaintiff was content to base his claim on the basis of the settlement deed dated 16th June, 1969 and that therefore no finding need be given on issue-4 relating to his adoption by late Krishnama Raja. In the circumstances, we are not called upon to go into the dispute with regard to the validity or otherwise of the adoption of the 2nd plaintiff.

10. Likewise, it is seen that issue No. 8 regarding the relief of injunction was not pressed before the lower Court. On a consideration of the entire oral and documentary evidence, the lower Court found on issue 11 that there was nothing to suspect the genuineness of the conduct of the lease of the trees by the defendants and therefore issue 11 was found in favour of the defendants. Issues 1 to 3, 5, 6 and 14 were answered in favour of the plaintiffs. Since the lower Court granted the relief of partition to the plaintiffs, issue No. 7 relating to the alternative relief of framing of a scheme, did not arise. It is seen that the plaintiffs have given up their claim of partition in respect of items 4 and 6, as per their endorsement on the plaint

and further they also conceded that they were entitled only to a 1/7th share in the plaint B-schedule properties and therefore the lower Court held that the plaintiffs would be entitled to a declaration in respect of a 1/7th share in items 1, 2, 4 and 6 of B-schedule and for partition of the said share in respect of items 3 to 5 only. In other respects, the plaintiffs' claim in the B-schedule properties was dismissed as not pressed. On issue-13 it was found that defendants 9 and 10 were also entitled to a share in the plaint A-schedule properties. On issue-9 the lower Court found that in view of its findings on other issues, the defendants were liable to render a true and correct account in respect of the income and profits derived from the plaint schedule properties from 13th June, 1967. Consequently, the plaintiffs' suit was decreed for partition and separate possession of their 1/6th share in A-schedule properties and 1/7th share in items 3 and 5 of B-schedule and for a bare declaration of their 1/7th share in items 1, 2, 4 and 6 of B-schedule, and for rendition of accounts from the defendants for the rents and profits of the plaint A-schedule properties with effect from 13th June, 1967. Costs of suit were directed to come out of the estate. In other respects, the suit was dismissed without costs. Aggrieved by this judgment, defendants 1 and 3 to 10 have preferred this appeal.

11. Mr. S. Ramalingam, learned counsel, appearing for the appellants, has raised the following contentions:

(1) As the trust properties are not partible, the plaintiffs cannot claim any share in the A-schedule properties nor partition of the same and the B-schedule properties are incapable of any useful purpose.

(2) The lower Court ought to have found that the plaintiffs have no right to demand any account for the income from the properties from the defendants and the plaintiffs have no right to question the leasing out of the properties.

(3) The trial Court has erred in finding that there is no material in Exhibit B-1 to infer that there is any real dedication or endowment to any deity or religious institution either absolute or partial, and that it is rather difficult to hold that Exhibit B-1 is a deed of dedication or endowment to be exempted from the rule against perpetuity.

(4) The consideration by the trial Court of the question as to whether the mode of succession as prescribed in Exhibit B-1 can be valid in law, has not been properly and legally done.

(5) The second plaintiff is not entitled to the first plaintiff's husband's share in the suit properties and the finding of the Court below on this aspect is unjustified both in law and on facts.

(6) The settlement deed Exhibit A-5 has no binding force against the defendants.

(7) The finding given by the lower Court on issues 1 to 3, 5 and 14 in favour of the plaintiffs cannot be sustained.

(8) The decree passed in favour of the plaintiffs that they together would be entitled to 1/6th share in the plaint A-schedule properties and the sale proceeds of the cardamom estate which are now in fixed deposit, is not correct. Similarly, the finding that the defendants must render account for the income and profits derived from the suit properties from 13th June, 1967, cannot be supported.

12. As per the pedigree given by the plaintiffs, the common ancestor, Subba Raja, son of Ramaswami Raja, had seven sons *viz.*, Ramaswami Raja, Annama Raja, Muthia Raja, Dharma Raja, Krishnama Raja, Kumaraswami Raja and Bheema Raja, of whom Annama Raja died unmarried and Muthiah Raja and Krishnama Raja died issueless. It is said that this Muthiah Raja had adopted one Raghupathi Raja, who is the 5th defendant in this action, and that Krishnama Raja, who was the first plaintiff's husband, adopted the 2nd plaintiff who is no other than his wife's (1st Plaintiff's) younger sister's son. This adoption of the 2nd plaintiff is

challenged by the defendants. Though there was an issue (issue-4) as to whether the 2nd plaintiff is the adopted son of late M. S. Krishnama Raja, at the time of the trial, the plaintiffs have given up that question of adoption and as such no finding has been recorded. That point also is not pressed in this appeal.

13. During the pendency of this appeal the appellants-defendants have filed C.M.P. No. 997 of 1976 stating that the first respondent Rama Ammal died on 5th April, 1975 and therefore her share in the joint decree in this suit has devolved upon her husband's brothers surviving at the time of her death, who are appellants 1 and 2, and as such it is prayed that appellants 1 and 2 be recorded as the legal representatives of deceased first respondent *viz.*, M. K. Rama Ammal.

14. They have filed another application C.M.P. No. 996 of 1976 stating that the 2nd appellant Bheema Raja (third defendant) also died on 8th January, 1976 and therefore his legal representatives *viz.*, appellants (defendants) should be added as the legal representatives of the second appellant. We shall advert to these applications and the resultant position at the end of the judgment.

15. It is the common case that the common ancestor Subba Raja had executed a registered trust settlement deed Exhibit B-1 dated 13th July, 1931 in respect of the three items of properties, of which the first is called Pattakadu, otherwise known as Karuppukkal Kadu. This corresponds to item 1 (*a*) of plaint A-schedule, which is shown as item 1 of the schedule to Exhibit B-1. The property mentioned in the second item of the schedule to Exhibit B-1 is a *thope* situate in Vadakku Venganallur, extending to an area of 16 acres 84 cents comprised in S. Nos. 708 and 710/1, which corresponds to item-2 of plaint A-schedule. It may be noted that out of the total extent of 16 acres 84 cents, an area of 6 acres 8 cents is said to have been transferred in exchange for some other property adjacent to this, which is said to have been annexed. Therefore, the present extent is only 10 acres 76 cents. The last item of property is the cardamom estate in Kerala State, measuring 29 acres 54 cents. This property was sold in the year 1955 itself *i.e.*, even during the lifetime of the first plaintiff's husband under the original of Exhibit A-3 dated 17th April, 1955, for a consideration of Rs. 7,500 though the sale deed recites only a consideration of Rs. 6,000. This item of property corresponds to item-3 of plaint A-schedule. As this third item of property is sold away, only the sale proceeds are available which are in fixed deposit. These three items of properties alone are mentioned in Exhibit B-1, registration copy of which is marked as Exhibit A-1. In a partition held in the year 1939 among the sons of Subba Raja under the original of Exhibit A-2, item 1 (*b*) of plaint schedule was included in the trust and this item is now said to have been annexed to plaint item 1 (*a*) of Schedule A.

16. In plaint B-schedule, there are seven items of properties, of which the 7th item is only a right of pathway and easementary right. The plaintiffs claimed 1/6th share in all the suit properties. However, the counsel for the plaintiffs, at the time of arguments before the lower Court made the following endorsement :—

> "As regards B-schedule, the plaintiffs will be content to get a partition of items 3 and 5 of B-schedule. As regards items 1, 2, 4 and 6 of B-schedule, they will be content to have a declaration of their right to 1/7th share therein alone. Claim for partition as regards 1, 2, 4 and 6 of B-schedule alone is given up."

From the above endorsement, the present claim boils down to this *viz.*, to the entire plaint A-schedule properties and items 3 and 5 of plaint B-schedule properties and the sale proceeds of the cardamom estate as mentioned in Exhibit B-1. Further, it appears from para. 17 of the judgment that the learned counsel for the plaintiffs has stated that his clients would be entitled to only 1/7th share in the plaint B-schedule and 1/6th share in the plaint A-schedule and the sale proceeds of the cardamom estate. It is seen from para-

graph 18 of the judgment of the Court below that the defendants had no objection as regards the 1st plaintiff's 1/7th share in the plaint B-schedule properties. The main contention of the defendants-appellants is that the plaintiffs could have absolutely no title to the plaint A-schedule properties and the sale proceeds of the cardamom estate and consequently they could not lay any claim for partition and separate possession of any such share, nor could they ask for framing of any scheme in respect of those properties or being put in management of the properties mentioned in Exhibit B-1 or even for the participation in the rents and profits, of the income therefrom.

17. The case of the plaintiffs is that a careful reading and scrutiny of the terms and conditions of Exhibit B-1 would reveal that there was no real intention on the part of the settlor Subba Raja to dedicate the properties absolutely to any trust, but on the other hand, it would show that the said document was evidently executed only with a view to tie up the properties mentioned in Exhibit B-1 in perpetuity in his family for the sole benefit of his sons and their descendants, of course with a direction that they should perform *Thirumanjanam*, *Sahasranama Archana* and *Neivedyam* to Lord Venkatachalapathi Swami presiding at Thiruvannamalai near Srivilliputhur every year in the month of *Purattasi*, at an expense of Rs. 25, and with a direction that after the demise of the settlor Subba Raja and his wife Lakshmi Ammal, they should perform poor feeding at an expense of Rs. 25 per annum on each of their annual *Shraddha* days. After defraying the expenses in this regard like payment of kist, etc., and the maintenance charges of the properties mentioned in Exhibit B-1, the residue was to be appropriated by all his seven sons and their descendants in equal moieties. According to the plaintiffs, the trust created is an illusory one and even on the date of the said trust deed, item 1 of A-schedule was fetching not less than an income of Rs. 1,500 per annum and similarly item 2 of A-schedule and item 3 appended to the said document was also each fetching an annual income of not less than Rs. 1,000 the aggregate amount from all these three items being not less than Rs. 3,500 even in the year 1931, *i.e.*, the year in which Exhibit B-1 was executed. They would further state that the expenses for the upkeep of the properties would not be more than Rs.400 and the expenses to be incurred in connection with the religious obligation as well as the expenses to be made on the *Shraddha* days of Subba Raja and his wife would be only Rs. 75 per annum and that after giving credit to those sums of money, there was a large residue in the properties and this should be, according to the terms of the document, divided among the heirs of the settlor in equal moieties. Further it is urged by the plaintiffs that the terms and conditions incorporated in Exhibit B-1 are all invalid and inoperative in law as there was no absolute dedication or disposition at all to any deity or trust and as the scheme of succession laid down by the settlor in the said document is clearly opposed to law and the settlor had absolutely no right to create a new form of trust or to alter the law of succession. On the other hand, the properties in question, according to the plaintiffs, were intended to be tied up with the family in perpetuity for the benefit of the male descendants of the settlor and as such the trust created is an illusory one and there is no real dedication of the property and therefore Exhibit B-1 offends the rule against perpetuity. Hence, the plaintiffs would be entitled to a share in there properties. Alternatively, it is pleaded that in case the Court finds that Exhibit B-1 is a valid document, then in view of the fact that there is no absolute transfer in favour of anybody, the plaintiffs would be entitled to a share in the suit properties fastened with the obligation of performing the charities. Resisting the above contention of the plaintiffs, the defendents have urged that Exhibit B-1 is a valid and enforceable document in all respects and therefore the plaintiffs would not have any right to the properties mentioned therein.

18. The pivotal question around which all the issues revolve is whether there is a total and absolute dedication or only a partial dedication of the properties.

In order to decide this question, we have to microscopically examine the intention of the settlor as can be gathered from the terms and recitals of the will Exhibit B-1. According to Mr. Ramalingam, this will Exhibit B-1 is not hit by the rule against perpetuity, and what is made by the said document is a total and absolute dedication. Alternatively he would plead that even if it is to be held as not one absolutely dedicating the properties, we have to see, in the light of the provisions of sections 14 and 15 of the Transfer of Property Act, whether the clause that the properties should not be alienated is hit by the rule against perpetuity.

19. Even at the outset, we may point out that the truncated fashion in which the learned counsel wants to read this document Exhibit B-1, cannot be made available to him as it would then be against the fundamental canon of construction of documents. Every instrument must be read, understood and interpreted as a whole. If this principle is not adopted, then it will lead to an anomalous result. In the instant case, learned counsel for the plaintiffs concedes that the latter part of Exhibit-B-1 offends the rule against perpetuity. Under such circumstances, the argument of the learned counsel that the rest of the clauses in Exhibit B-1, other than the one offending the rule against perpetuity should be given effect to, cannot be accepted since such acceptance would lead only to an absurd construction which has to be avoided in order to perpetrate the well-known principle of harmonious construction of documents.

20. Learned counsel relied upon a decision in *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer*[1], in support of his contention that the rule against perpetuity would hit only the offending clauses of the document but not the entirety of the document. The above decision is not helpful to the appellants-defendants since in the present case a substantial portion of Exhibit B-1 is opposed to law and as such void and it is not as if only a portion of it is offending the rule against perpetuity and as if the other clauses are valid and operative. About this peculiar feature of this case, we shall presently deal.

21. The lower Court has held that the document Exhibit B-1 has to be treated as void in view of the fact that under this document the settlor had only intended to keep the properties intact in perpetuity in his family there being no dedication or endowment to any deity or religious institution, and found issues 1 to 3 and 5 in favour of the plaintiffs. According to Mr. Ramalingam, the conclusions arrived at by the trial Court in paragraphs 36 and 37 on which the findings are based, are totally incorrect. Mr. N. C. Raghavachary, learned counsel for the respondents, submitted that the properties settled in favour of the second plaintiff by the first plaintiff on the strength of Exhibit A-5 (settlement deed dated 16th June, 1969) in respect of her deceased husband's share in the suit properties which had devolved upon her on his death can at the most be said to be burdened with the charge of performing the charities. In other words, the alienee would take the properties subject to the charge of the trust. Now, we shall scrutinise the document to see whether it is hit by the rule against perpetuity or is completely void, or whether any portion of the document can be saved and whether the properties are absolutely dedicated.

22. A dedication of properties for religious or charitable purposes must be either absolute or partial. In the former case, the properties are given out and out to an idol or to a religious or charitable institution and the donor divests himself of all beneficial interest in the properties comprised in the endowment. In the latter case of partial dedication, a charge is created on the properties or there is a trust to receive and apply a portion of the income for the religious and charitable purposes. In such case, the property descends and is alienable and partible in the ordinary way, the only difference being that it passes with the charge upon it.

1. 1952 S.C.J. 655 : (1953) 1 M.L.J. 108 : 1953 S.C.R. 232 : A.I.R. 1953 S.C. 7.

23. The mere execution of a deed of gift or instrument is not enough to constitute a valid endowment. It is necessary that the executant should divest himself of the properties; there must be a transfer of the apparent evidences of ownership from the donor to the donee and in cases where there is no real dedication of properties but only a creation of perpetuity in favour of one's own descendant, the alleged gift in favour of the idol or religious or charitable institution becomes void. This position of law is clearly laid down in various decisions of which we shall refer to a few presently.

24. In *Menakuru Dasarathatami Reddi and another* v. *Duddukuru Subba Rao and others*[1], the Supreme Court has observed thus:

"Now it is clear that dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character.....If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication. It is naturally difficult to lay down a general rule for the solution of the problem. Each case must be considered on its facts and the intention of the parties must be determined on reading the document as whole".

The Supreme Court in *Nirmala Bala Ghose and another* v. *Balachand Ghose and others*[1], have laid down the following proposition:

"The question whether a deed of dedication of properties to deities, creates an absolute or partial dedication must be settled by a conspectus of all the provisions of the deed. Where the property is wholly dedicated to the worship of the idol without reserving any beneficial interest to the settlor, his descendants or other persons, the dedication is complete; if the intention of the deed is to create a charge in favour of the deity and the residue vests in the settlor, the dedication is partial...... The Court has to ascertain the intention of the settlor and for that purpose to take into consideration all the terms of the deed. If it appears on a review of all the terms that after endowing property in favour of a religious institution or a deity, the surplus is either expressly or by implication retained with the settlor or given to his heirs, a partial dedication may readily be inferred, notwithstanding the apparently comprehensive words of the deposition in favour of the religious endowment."

In *S. Shanmugam Pillai and others* v. *K. Shanmugham Pillai and others*[2], the Supreme Court has reiterated the proposition of law laid down in *Dasaratharami Reddy's case*[3].

25. A plain and careful reading of the recitals of Exhibit B-1 in the light of the legal proposition laid down by the Supreme Court as above would unambiguously and clearly show that there is no absolute or total dedication of the properties either to any deity or to any religious institution. But, on the other

1. 1957 S.C.J. 835: 1957 S.C.R. 1122 (1957) 2 An.W.R. (S.C.) 175: (1957) 2 M.L.J. (S.C.) 175: A.I.R. 1957 S.C. 797.

1. (1966) 2 S.C.J. 426: (1965) 3 S.C.R. 550: A.I.R. 1965 S.C. 1874.

2. (1973) 2 S.C.C. 312: A.I.R. 1972 S.C. 2069 at 2076.

3. (1957) 2 M.L.J. (S.C.) 175: 1957 S.C.J. 835: 1957 S.C.R. 1122: (1957) 2 An.W.R. (S.C.) 175: A.I.R. 1957 S.C. 977.

hand, the settlor had intended under Exhibit B-1 to tie up the properties mentioned therein in perpetuity in his family, which clause would undoubtedly clearly offend the rule against perpetuity.

Now, we shall extract the relevant portion of clause 6 of Exhibit B-1:

"...குடும்பத்திலேயே எப்பொழுதும் இருந்து விருத்தியாகிக்கொண்டு சாஸ்வதமாய் இருந்து வரவேண்டும்".

Clauses 7 and 10 read thus:

"7. இந்த சாசனத்தில் கண்ட சொத்துக்களையாவது அதன் வருமானத்தையாவது தனித்தனியாகவோ ஒருமித்தோ ஷை தருமங்களை கட்டுப்படுத்தியோ முதலிய எவ்விதமான பராதினத்துக்குள்படுத்த எனக்கும் என்னுடைய குமாரர்களுக்கும் அவரவர்கள் சந்ததி பிரம்பரைகளுக்கும் தனித்தாவது பின் வாரிசுகளை கட்டுப்படுத்தியாவது எல்லோரும் சேர்ந்து ஒருமித்தாவது செய்ய எவ்விதமான சுதந்திரமும் பாத்தியமுமில்லை.

10. (எ) பெண் சந்ததிகளுக்காவது ஷையார்களின் ஆண் சந்ததிகளுக்காவது.

(பி) ஜாதி மதம் இவைகளில் மாறுதல் அடைந்த ஆண் சந்ததிக்காவது அவர்களின் சந்ததி பரம்பரைக்காவது இந்த சாஸனத்தில் எவ்விதமான பாத்யமும் சுதந்திரமுமில்லை. பின் துடர்ச்சியுமில்லை.

(சி) மேலே கண்ட ஜாதி மதம் இவைகளில் மாறுதல் அடையுமுன் நம்மள் க்ஷத்திரிய தருமப்படி ஷையார்களுக்கு விவாகம் செய்திருக்கும் ஜனித்திருக்கிற ஷையார்களுடைய ஆண் சந்ததிகளுக்கும் இந்த சாஸனத்தில் பாத்தியமும் சுதந்திரமும் உண்டு".

If we go through the entire document Exhibit B-1, the intention of the settlor is reflected to the extent that the testator intended that the estate should remain intact and be kept by his family from generation to generation. Further, the testator had intended that the properties should remain in his family in the male line without power of alienation. The income of the properties in Exhibit B-1 is substantially intended to be used for the benefit of the family and only an insignificant and minor portion of it is allowed to be used for the performance of *archana* to Sri Venkatachalapathi in the Tiruvannamalai Temple at Srivilliputhur and for the poor-feeding on the *Shraddha* days of the testator and his wife. This in our view, would amount only to a charge created over the properties covered under Exhibit B-1. Thus, the settlor has not divested himself of the properties. The parties to the document have by their conduct also treated these properties as family properties. Subsequent to Exhibit B-1, a portion of item 2 of plaint A-schedule was divided amongst some of the sons of the settlor Subba Raja in a family partition. The explanation now put forth by the defendants is that this was only an exchange and in substitution of this land some other land was given. This explanation cannot be accepted in view of the tenor of Exhibit B-1 which does not contemplate any such exchange; on the contrary it prohibits all kinds of alienations. The second circumstance relating to the conduct of the parties is that the income from these properties was being utilised for the upkeep and maintenance of *pannai* properties of the settlor, as seen from the accounts. Vide Exhibits D-6 and D-7. Admittedly, D.W. 1 (the 1st defendant) had received a sum of Rs. 500 from the interest amount that had accrued on the sale proceeds of the cardamom estate. Further, there is no separate account for these so-called trust properties. Contrarily, the income and expenditure for these properties are written in common account books which relate to other properties as well as the properties covered under Exhibit B-1. The clubbing of the income of these properties would also be a circumstance indicative of the fact that there was no divesting of the interests or rights in these properties. For the above-stated reasons, we uphold the finding of the Court below that there is no absolute or total dedication of the properties under Exhibit B-1.

26. Under the Hindu Law, no estate can be created which is unknown to it and a bequest in favour of unborn children is invalid by virtue of section 114 of the Indian Succession Act as it offends the

rule against perpetuity, refer *M. Kesava Gounder* v. *D.C. Rajan*[1], to which judgment one of us was a party. In the case on hand, the settlor has imposed a perpetual bar against alienation of the properties by stating that they must be in his family, that too with the male descendants from generation to generation. About this fact there is no dispute. Hence we see no reason to displace the finding of the Court below that this provision will offends the rule against perpetuity.

27. Then arises the question as to whether the mode of succession created in Exhibit B-1 can be held to be valid in law. Exhibit B-1 was created in the year 1931. Krishnama Raja died on 13th June, 1967, leaving behind his wife the first plaintiff, as his legal heir. Besides the first plaintiff, the second plaintiff, the adopted son, was also alive as his legal heir. But, as this question about adoption has not been pressed, we do not want to traverse much on that point. At any rate, it is clear that Krishnama Raja, the husband of the first plaintiff, died after the introduction of the Hindu Succession Act, 1956. Clause 10 of the will prohibits the female members and their heirs from inheriting the properties There cannot be any doubt that an individual cannot create a new form of estate or alter the line of succession allowed by the law for the purpose of carrying out his own wishes or views or his policy contrary to statutory law. The line of succession created under Exhibit B-1 is not for the mere management of the properties, but it is for the inheritance to the proceeds of the properties and as such the said line of succession created under Exhibit B-1 *viz.*, excluding the females from inheriting the properties, is opposed to law. The fact that the pattas Exhibits B-50 and B-51 stood in the name of the huqdars and that the kist was paid by them under Exhibits B-16 to B-44 and that the 10 (1) account in respect of properties stood in the name of the defendants under Exhibits B-52 to B-54 would never advance the case of the defendants any further.

1. (1976) 1 M.L.J. 56 : 89 L.W. 205 : A.I.R. 1976 Mad. 102.

28. From the above discussions therefore, we hold that the findings of the Court below given in favour of the plaintiffs under issues 1 to 3 cannot be dislodged and that the first plaintiff under such circumstances would be entitled to the due shares of her husband in the properties mentioned in Exhibit B-1.

29. The first plaintiff, after the death of her husband, had executed a settlement deed Exhibit A-4 dated 20th December, 1967 in favour of the 2nd plaintiff in respect of the properties of her husband that had fallen to his share under the partition deed Exhibit A-2 dated 15th May, 1939, after having reserved a life estate in her favour. P.W. 2, is one of the attestors to Exhibit A-4, and he speaks to the execution of the said document. The lower Court placing reliance on the evidence of P.W. 2, has held that Exhibit A-4 is a true and valid document. Thereafter, the first plaintiff had executed another settlement deed Exhibit A-5 dated 16th June, 1969 in favour of the 2nd plaintiff in respect of her deceased husband's share in the properties which, according to her, had devolved upon her on her husband's death. By this document she has conveyed absolutely all her right, title and interest in the suit properties to the 2nd plaintiff. P.W. 2 has also attested this document. The lower Court has held that Exhibit A-5 is also a true document. As the suit is not in respect of the properties mentioned in Exhibit A-4, no question as to the binding nature of Exhibit A-4 would arise. As regards the binding nature of Exhibit A-5 on the defendants, it depends upon the rights of the first plaintiff to the suit properties. Since we have held that the first plaintiff was entitled to the share of her husband in the properties covered under Exhibit B-1 the 2nd plaintiff would automatically get the share that had devolved upon the first plaintiff by virtue of Exhibit A-5, subject to the charge created under Exhibit B-1. Hence, we confirm the finding of the Court below on this aspect of the case.

30. Regarding the question of rendition of accounts for the rents and profits in respect of the plaint A-schedule pro-

perties with effect from 13th June, 1967, it was contended by Mr. Ramalingam that there cannot be any account; but the first plaintiff, in case she establishes her rights over the due share of her husband, would be entitled only to the mesne profits for a period of three years prior to the date of the filing of the suit. But, we are unable to accept this contention for the reasons mentioned by the Court below. Accordingly, we confirm its finding on issue No. 9.

31. The appeal is dismissed. There will be no order as to costs.

32. In view of our above findings, C.M.P. No. 996 of 1976, a petition to bring on record the legal representatives of the deceased second appellant, is allowed. In so far as C.M.P. No. 997 of 1976 is concerned, it is dismissed in view of our judgment as above.

R.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*T. Ramaprasada Rao and C.J.R. Paul, JJ.*

C.V. Ramaswami Naidu and others ... *Appellants**

v.

C.S. Shyamala Devi and others ... *Respondents.*

(A) *Transfer of Property Act* (*IV of* 1882), *section* 45—*Property acquired in the name of one of two brothers—Use of common fund earned by the exertions of both brothers—Effect—Just and equitable claim cannot be warded off.*

(B) *Indian Trusts Act* (*II of* 1882), *sections* 90, 94 *and* 95—*Quasi-trusts.*

(C) *Co-ownership—Concept.*

Co-ownership is a relationship which springs and slopes from consensus and contract. Legislation has only imprinted on the concept of co-ownership certain rights which have a supervening effect which are declaratory of the rights *inter se* as between co-owners. The legal relationship is always knitted in a framework of jointness and no one therein can predicate with certainty as to what portion of the property held in common is his, and an element of inseparability is inhered in the doctrine of co-ownership. What can be predicated by reason of section 45 of the Transfer of Property Act and by invoking the principle of quasi-trust in the Indian Trusts Act is the quantum of rights of such co-owners in the entirety of the property. Such qualification of rights of each of the co-owners in a given property depends on the facts and circumstances of each case. It is for the purpose of providing a just rule for weighing and appreciating the value or interest of a co-owner in joint property, that the rule of equity is evolved in section 45 of the Transfer of Property Act. [*Para.* 26.]

If the source of the purchase price or the consideration for the investment in a joint enterprise emanates from a common fund, then the shares of each of the co-owners or co-entrepreneurs would be the same as their interest in that common fund. This equitable right in subject to a contract to the contrary. If, therefore, there is evidence that two or more persons purchased the property or an interest in the property, then the rule in section 45 of the Transfer of Property Act would be automatically attracted unless the parties have contracted otherwise in the matter of their quantum of interest in the joint property. The fact that the property was purchased in the name of one of the co-owners, would not make a serious dent on the above rule of good conscience, provided however it is established by acceptable evidence that such purchase in the name of a co-owner was by accident or by consent and that the consideration for such purchase emanates from a common fund. It is this rule of justice, equity and good conscience which is reiterated in the Indian Trusts Act by the provisions which deal with quasi-trusts as they are styled in legal parlance. In section 94 of the Trusts Act, which is residuary in character, a provision is,

*O.S.A. No. 81 of 1975 and A.Nos. 216 of 1971 and 615 of 1975. 14*th November*. 1977.

made to cover cases where the legal and equitable interests are not united in the same person. In a proved case of holding of a property, by an individual in his own name but for the benefit of others who are also interested in it, the individual has accepted his position as a constructive trustee of such property and he has to hold the same for and on behalf of the person for whom and for whose benefit he holds it. Excepting for certain rights he has to deal with the said property for the conjoint benefit of himself and other co-owners; he cannot project in himself a title which is inconsistent with or derogatory to the title of the other co-owner. It therefore follows that the concept of co-ownership has certain peculiar rights and liabilities attached to it and that is why it is accepted law that a co-owner cannot even by the mere possessory title of the property in him claim the same by adverse possession. One can be said to hold a property adversely to the other, provided it is open, continuous and public possession which is to the prejudice of the other co-owner. Since such continuous, open and adverse possession by one co-owner against the other is not possible, having regard to the indivisible and well-knit rights of all co-owners in the totality of the property, one co-owner cannot set up an adverse title to the prejudice of the other co-owner though he may be for all physical purposes in corporeal possession of the concerned property. [*Para.* 26.]

Cases referred to:

Arokia Manikaran v. *Sowrivaru Manikaran*, (1953) 8 D.L.R. Trav.-Co. 203; *Cooke* v. *Head*, (1972) 2 All E.R. 38; *Macdonald* v. *Macdonald*, (1957) 2 All E.R. 690; *Bull* v. *Bull*, (1955) 1 All E.R. 253.

O.S.A No. 81 *of* 1975:

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Mohan, dated 3rd December, 1974 and passed in the Ordinary Original Civil Jurisdiction of this Court in C.S.No. 16 of 1972.

Appeal No. 216 *of* 1971:

Appeal against the decree of the City Civil Court (III Asst. Judge), Madras, dated 18th November, 1970 and passed in O.S. No. 2960 of 1967.

Appeal No. 615 *of* 1973:

Appeal against the decree of the City Civil Court (III Asst. Judge), Madras, dated 18th November, 1970 and passed in O.S.No. 2771 of 1967.

J.R. Alwar Naidu and *S. Balathandapani*, for Appellants.

N.S. Varadachari, *T.V. Ramanujam* and *M.A.R. Riazuddin*, for Respondents.

The Judgment of the Court was delivered by

Paul, J.—O.S. A. No. 81 of 1975 is an appeal under clause 15 of the Letters Patent against the judgment and decree of the learned single Judge on the Original Side of this Court in C.S. No. 16 of 1972. A.S. No.615 of 1973 and A.S. No.216 of 1971 are appeals filed against the judgment and decree of the learned III Assistant Judge of the City Civil Court in C.S. Nos. 2771 and 2960 of 1967. These two appeals have been transferred to the file of this Court to be heard along with O.S.A. No. 81 of 1975.

2. All the three appeals are by C.V. Ramaswamy Naidu who is the first defendant in O.S. No. 16 of 1972 and the plaintiff in O.S. No. 2771 of 1967 and 2960 of 1967. C.S. No. 16 of 1972 was filed by C. V. Srinivasan, the brother of the appellant in all these appeals for partition and separate possession of his half share in the immovable properties described in the plaint A Schedule and the movables set out in the plaint B Schedule and for a decree directing the first defendant to pay to the plaintiff a half share in the investments made by the first defendant as set out in the C Schedule and for a decree directing the defendants to render a true and correct account of all the rental income derived by the defendants from the immovable properties and the investments made by the first defendant.

3. O.S. No. 2960 of 1967 was filed by the first defendant in C.S. No. 16 of 1972 for a declaration that he is the real

owner of the house and ground No. 7 Jagannathapuram I Street, II Lane Chetpet, Madras, described in the plaint schedule and for a decree directing the defendant to deliver vacant possession of the property. O.S. No. 2771 of 1967 was also filed by the plaintiff in O.S. No. 2960 of 1967 and 1st defendant in C. S. No. 16 of 1972 for a declaration that he is the real owner of the amount due under the suit promissory note and for recovery of a sum of Rs. 1,045 from the second defendant in that suit.

4. During the pendency of the suit C. S. No. 16 of 1972 the first plaintiff died and his legal representatives have been brought on record as plaintiffs 2 to 8 as per the order of the Court dated 12th December, 1973.

5. The plaintiff in C.S. No. 16 of 1972 and the plaintiff in O.S. Nos. 2960 and 2771 of 1967 are brothers being the sons of one C.R. Varadarajulu Naidu. Defendants 2 to 4 in C.S. No. 16 of 1972 are the wife and daughters of the first defendant. According to the plaintiff in C.S. No. 16 of 1972, he and the first defendant were members of an undivided Hindu family and they both started together the business of running a tea stall at No. 1, Jagannathapuram First Street, Chetpet, Madras in or about the year 1947 and though the licence for that tea stall was obtained in the name of the first defendant, yet it was a joint business conducted by the plaintiff and the first defendant with the funds provided by both of them, which funds consisted of the savings which both the plaintiff and the first defendant had made while the plaintiff was employed as a watchman in the Corporation of Madras and the 1st defendant is variously employed and subsequently with the profits earned by the aforesaid tea stall they both started a military hotel under the name and style of Om Sakthi at No. 14, Jagannathapuram II Street, Chetpet, obtaining the licence for the same in the name of the plaintiff and in the year 1952 however the tea stall at No. 1, Jagannathapuram First Street, Chetpet, was closed down, but the military hotel was continued and it flourished and earned considerable profits and with those profits a property bearing door No. 4, Jagannathapuram First Street, Chetpet, Madras, was purchased in 1956 in the name of first defendant and in the year 1959 the property bearing door No.7, Jagannathapuram I Street, Second Lane, Chetput, Madras was purchased out of the joint funds in the name of the plaintiff and in the year 1966 another building bearing door No. 14, Jagannathapuram II Street was purchased in the name of Ethirajulu Naidu the maternal uncle of the plaintiff and of the first defendant with the joint income earned by the plaintiff and the first defendant and further the plaintiff and the first defendant are also running a taxi MSX 5895 from the year 1964 which taxi had been purchased in the name of the second defendant, the wife of the first defendant with the joint funds, but in the year 1967, disputes arose between the plaintiff and the first defendant and the first defendant sold away the taxi in October, 1967 and took away all the account books and sent away the plaintiff and the plaintiff later on came to know that the first defendant had been secretly investing the joint monies by advancing the same to third parties on mortgages and on promissory notes in the names of defendants 2 to 4 who are his wife and daughters with a view to deprive the plaintiff of his half share in those amounts. The plaintiff has listed out in the plaint the amounts so advanced and claims that the first defendant is liable to render accounts for the monies so advanced and also for the rental income which he had been collecting from the immovable properties.

6. The first defendant in C.S. No. 16 of 1972 resisted the suit contending that he and the plaintiff were never members of an undivided Hindu family and that all the properties claimed by the plaintiff were his, the first defendant's separate and self-acquired properties, acquired by him without the aid of any ancestral nucleus and that therefore the plaintiff is not entitled to any share in those properties or in the incomes

from the investments or from those immovable properties. According to him, he started eking out his livelihood at Madras and other places from the year 1936 and was employed in a number of tea shops and then from 1939 he was employed under one Namberumal Chetty, a leading contractor and later on he was working as a male nursing orderly in the General Hospital, Madras and in the year 1939 the feelings between him and his father became estranged and his father put in a publication in the Dinamani dated 6th July, 1943 that he, the first defendant had nothing to do with the properties which the father was owning (which were however very negligible) and while he the 1st defendant was working as a nursing orderly in the General Hospital he was sent to Rangoon in 1941 at the time of the Second World War and he returned to Madras in 1942 and with the savings which he had accumulated by then he started a tea stall in the year 1947 near his residence at No. 1, Jagannathapuram First Street, II Lane, Chetpet, taking out the licence for the same in his own name and since his wife long prior to 1947 had also been preparing and selling edibles and had accumulated some savings of her own and further since he, the first defendant was a race-goer from the year 1939 and had the good fortune to make substantial gains in races periodically he started investing monies by lending monies. He emphatically denied that the plaintiff contributed any funds for the starting of that tea stall. He further asserted that the plaintiff had nothing to do with the tea stall, but since the plaintiff had no means for his upkeep and maintenance he approached him, the first defendant for help in eking out a livelihood and hence the plaintiff was asked to look after the sales in the first defendant's tea stall and in return he was provided with food and clothing and subsequently the first defendant started in 1950 a second tea stall out of his own funds, at No. 14, Jagannathapuram II Street, Chetpet, Madras and since he felt that he could not easily obtain and hold two licences in his name from the Corporation for the conduct of two similar business, he had to obtain the licence for the second hotel in the name of the plaintiff and after the first tea stall was closed down in 1952, the plaintiff was helping him the first defendant in running the second tea stall which became an eating house in 1956 and was popularly known as "Ramaswamy Hotel" and he, the first defendant was in exclusive management of the business and was maintaining the accounts and receiving the profits as of right and on his own and maintaining the family of the plaintiff and giving them food and other necessaries in consideration of the physical help rendered by the plaintiff. But in the year 1966 that business was also closed down and he, the first defendant started a third business at No. 7-A, Rajambal Street, Chetpet, Madras, under the name and style of Hotel Panchamirtham, obtaining the licence in his own name and with his own funds. But that business had to be closed down in 1968 on account of several litigations between him and the landlord of the premises in which the hotel was being run. The first defendant further contended that he acquired the property bearing door No. 4, Jagannathapuram First Street, Chetpet in 1956 for Rs. 19,000 out of which a sum of Rs. 14,000 was paid by him out of his own funds to the vendor at the time of the purchase and for the balance a deed of mortgage was executed and that mortgage was later on discharged by him, the first defendant and he has been in exclusive enjoyment of that property paying the public rates and taxes, having custody of the document, and realising the rent and the plaintiff has absolutely no right, title or interest in that property and likewise the property bearing door No. 7, Jagannathapuram First Street, 2nd Lane, Chetpet, was also purchased by him out of his own funds but benami in the name of the plaintiff and actually he, the first defendant had advanced out of his funds a sum of Rs. 3,500 to one Rengiah who originally owned the property on the security of a mortgage dated 31st December, 1951, executed by him and

later from 1951 onwards he the first defendant had become a tenant under Rengiah, and on the death of Rengiah he acquired the property by purchase in 1959 from the heirs of Rengiah for a sum of Rs. 4,500, adjusting a cash of Rs. 1000 and the amount due under the mortgage deed. He asserted that the aforesaid amounts were not joint funds but were exclusive funds belonging to him and subsequently after his purchase he had demolished the old structure and had reconstructed the material portions of the building spending Rs. 25,000 to Rs. 28,000 from and out of his own funds and occupied the entire downstairs for his residence and leased out the upstairs and has been collecting rent for the same and paying the public rates and taxes and having the custody of the documents and the plaintiff was only allowed to reside in the premises along with him, the first defendant, and the plaintiff was permitted to use two rooms in the premises as a temporary measure; but on account of ill-feelings that arose in 1967 the plaintiff forcibly opened the door of the third room in defiance of the order of the City Civil Court and has been occupying the three rooms in the premises.

7. In regard to the premises No. 14, Jagannathapuram, Second Street, Chetpet, Madras, also the first defendant's claim was that he purchased the property with his own funds under a registered sale deed dated 20th July, 1956 from one V. Venkatasamy and others for a price of Rs. 7,500 but that the sale deed was taken in the name of his father-in-law Ethirajulu Naidu who was also the maternal uncle of the plaintiff and it is he, the first defendant, who has been realising the rent from that property and paying the public rates and taxes and having the custody of the documents of title. He asserted that the income from the hotel business was hardly sufficient to maintain his family since the monthly income from that business was never more than Rs. 300 and actually it was from out of the gains made by him in the racecourse and the income realised by him out of his investments that he made the aforesaid purchases. With regard to the taxi MSX. 5895 the first defendant contended that he purchased the same from one Jethswany for Rs. 11,300 in the name of the second defendant out of his own funds and subsequently in September, 1967 it was sold away for Rs. 8,000. With regard to the several items of mortgages mentioned in paragraph 7 of the plaint, the first defendant's case is that all of them were monies advanced from out of his own funds.

8. The second defendant who is the wife of the first defendant and defendants 3 and 4 sailed with the first defendant.

9. The plaintiffs 2 to 8 filed a reply statement contending that the first plaintiff and the first defendant were living together from the year 1946 and pooling their income and the first tea stall was started in the year 1947 only with that joint income and the subsequent acquisitions were all made with the profits earned by that business.

10. It might be mentioned at this juncture that the suit O.S. No. 2960 of 1967 was filed by the first defendant herein for a declaration that the property bearing door No. 7, Jagannathapuram I street, II Lane, Chetpet, Madras, belonged to the first defendant, though standing in the name of the plaintiff herein and that suit having been dismissed A.S. No. 216 of 1971 has been filed against that decree by the first defendant and the suit O.S. No. 2771 of 1967 was filed by the first defendant for a declaration that the sum of Rs.1,000 advanced to one Damodaran in the name of the plaintiff belongs to him, the first defendant and for recovery of the same and that suit having been dismissed the first defendant has filed A.S. No. 116 of 1971. These two appeals however stand abated inasmuch as the legal representatives of the deceased C. V. Srinivasan, the defendant in those suits and the respondent in these appeals have not been brought on record.

11. Mr. N. C. Raghavachari contends that effect of the dismissal of the above two appeals on the abovesaid ground will be to make the findings of the learned trial Judge in the two suits which gave rise to those two appeals final and would consequently raise the bar of *res judicata* in the appeal O.S.A. No. 81/75 in regard to the matters on which such findings have been given. But it is not necessary for us to go into that question for the disposal of this appeal O.S.A. No. 81 of 1975.

12. The learned Judge on the original side has found most of the issues in favour of the plaintiff in the suit C.S. No. 16 of 1972.

13. Under appropriate issues, the learned Judge, Mohan, J., found on the evidence adduced by both sides that the two brothers, the first plaintiff and the first defendant broke away from the original joint Hindu family because of the strained relationship with the father and put forth their joint efforts and the first defendant being the elder brother was managing the entire affairs and as a result of their joint efforts certain income accrued which income was mixed up with the personal income from the races, and various properties were acquired but in the absence of the accounts and better evidence it was not possible to predicate as to what exactly was the contribution by the respective parties towards these acquisitions and assuming that they cannot be members of an undivided Hindu family certainly they will be co-sharers and tenants-in-common and in the absence of an agreement each would be entitled to a half in the properties. As regards the A Schedule properties which consisted of three items of immovable properties he found that the purchase of item 1 was at a time when the second shop, which was a military hotel, was yielding profits and that is how it was possible for the first defendant to make that purchase and the second item also should be held to have been acquired by the joint efforts for in respect of the the consideration for that item the evidence showed that there was a mixing up of the income. With regard to the third item also he held that it was an acquisition by their joint efforts and the plea that it was purchased benami in the name of the first plaintiff was rejected by him. With regard to the B Schedule properties, he found that inasmuch as there was no plea that they were acquired out of the joint efforts, he had to necessarily hold that the plaintiffs had not established that they were entitled to a share. He held that the claim to the C Schedule properties was barred by limitation. He therefore passed a preliminary decree in favour of the plaintiffs for partition of their half share in the items contained in the A Schedule. He further held that the first defendant was liable to account to the plaintiffs with regard to the rental income from the properties in the A Schedule. Challenging these findings, the first defendant has filed this appeal, O.S. A. No. 81 of 1975.

14. The contentions strenuously advanced on behalf of the defendants by their learned counsel Mr. K. N. Balasubramaniam are that there is satisfactory evidence to show that the acquisitions of the A Schedule properties were all made by the first defendant out of his own funds, namely, the gains which he had made in the race course and the income which he realised by his investments and that even assuming that the hotel business was being carried on by the joint efforts of the plaintiff and the first defendant, and with their joint funds even then the evidence establishes that the income from the business which were negligible and were sufficient only to maintain the family of the first defendant would not have constituted any part of the funds with which the acquisitions of the A Schedule properties were made.

15. As has been pointed out by the learned Judge on the original side, it is unbelievable that from out of the gains made by the 1st defendant in the race course, the acquisitions were made. The learned Judge has pointed out that "even though in Exhibit P-25 it has

been stated that all the three hotel businesses ended in a loss, it is admitted that these businesses were very profitable and if these businesses had earned profits it was the duty of the first defendant to have shown what exactly are the profits which resulted in those acquisitions and taking an overall picture of the matter and having regard to the income as seen from the various assessment orders from these businesses it cannot be held that those incomes provided the necessary funds for these acquisitions and the outstandings. The learned Judge has observed that to his mind it appeared that neither party was speaking the truth and each was putting forth an exaggerated version and as such it is imperative for the Court to analyse the evidence carefully and find out what exactly is the correct state of affairs. We are in entire agreement with those observations of the learned Judge.

16. First of all, as has been pertinently pointed out by the learned Judge, the case of the first defendant has not been consistent at all. In Exhibit D-7 he does not say that the business ever ended in a loss. On the contrary in Exhibit D-55 he has stated that the business was very profitable. In this evidence he confessed that it was not possible for him to tell the Court as to what was the total profit earned from those businesses during the period of 16 years from 1950 to 1966. While at one place in his evidence he would say that the income from the shops was not sufficient to maintain the family, he had admitted before the City Civil Court in the other two suits that profits were earned by the second shop and that the profits were kept in a box. The first defendant did not produce any account books in regard to the first tea stall which was opened in 1947 with the licence in his name but asserted that those account books were lost and are not available. This puerile explanation can never be accepted. As regards the second shop, some account books were produced and the claim by the first defendant was that the others have been lost. This explanation also is equally puerile. From the account books produced, it is not possible to ascertain the actual income earned by the second shop. In the pleadings, it must be noted, the first defendant has not stated that the account books had been lost. In his written statement he has categorically admitted that he was in custody of the accounts. Therefore, from the non-production of these account books an adverse inference could be raised against the first defendant when the explanation that the account books are lost is not accepted.

17. The assessment orders however show that the second shop which was started in the year 1950 in the name of the plaintiff was earning profits which were progressively increasing as shown by the assessment orders Exhibits D-22 to D-26 from the year 1958 onwards at least. In 1958, the net turnover of that shop as determined by the assessing authority was Rs. 10,562 and in the next year also the same turnover was determined. In the year 1960 the turnover was assessed at Rs. 14085 and in 1961 also the same turnover was determined. In 1963 the turnover was determined at Rs. 15,967.35. In 1964, it was determined at Rs. 18,194.13 and in 1965 it was determined at Rs. 33,939.05 and in 1966 it was determined at Rs. 40,560.68 but it cannot be gainsaid that the second tea shop which eventually became an eating home was a profitable concern. Now, the licence for this shop, it might be noted stood in the name of the first plaintiff and the assessee in the assessment orders has been noted as the first plaintiff. It might be noted that the first item of the A schedule properties was purchased in the year 1956 for Rs. 19,000. The third item of the plaint A Schedule was purchased on 22nd July, 1959 for Rs. 4500 in the name of the plaintiff. The second item was purchased in the year 1966 in the name of the maternal uncle of the first plaintiff and the first defendant Ethirajulu Naidu, who as we have said, is the father-in-law of the first defendant. The aforesaid acquisitions could have therefore been made partly with the aid of the income from that shop. The first tea stall which was started in the year 1947 at

No. 1, Jagannathapuram I Street, Chetpet, was no doubt started in the first defendant's name. The first defendant in his evidence as D.W. 1 claimed that he invested Rs. 300 to Rs. 400 in that business and that the daily sales in the tea stall was about Rs. 5. This tea shop it might be noted was being run from 1947 to 1953. The 1st plaintiff in his evidence asserted that from 1946 he had been living with the 1st defendant. Even according to D.W. 1's own admission the first plaintiff was living with him from 1950 onwards until 1964. It is admitted by the first defendant that his first cousin Parthasarathy Naidu was having a tea stall in 1946 and the suggestion is that that tea shop was being run at No. 1, Jagannathapuram I Street and that that tea stall was given by Parthasarathy Naidu. Even though according to the first defendant, the daily sales from the first tea shop was only Rs. 5 yet in his testimony he would claim that the income earned in the first business was invested in the second business. He admits that the first plaintiff was helping him in the second tea shop which incidentally was being run under a licence which stands in the name of the first plaintiff. The reason given by the first defendant for having obtained the licence in the name of the first plaintiff for that second tea shop is hardly acceptable. He says that since the licence for the first tea shop was in his name, he thought that there would be difficulty in his obtaining a licence for the second shop also in his own name and hence took the licence for it in the name of the first plaintiff. He however resiled from that answer when cross-examined. When he was asked what was the source for the funds which he invested in the second shop, he stated that his wife was earning and he was also getting money from the race and he was also having the monies which he got as profits from the first shop and further the monies which are earned by his father-in-law were with him and all those he invested in the second business. These assertions of his are definitely an afterthought, for his earlier contentions were that the income from the first shop was hardly sufficient to maintain his family and that it was entirely with the money earned from the races that he started the second shop.

18. He did not state at any earlier occasion that he had with him the monies which his wife earned and the monies which his father-in-law gave. Subsequently he gave yet another reason for having taken the licence in the name of the first plaintiff and that was that he was extremely angry with his father and took out the licence in the name of the first plaintiff so that his father could be put to shame. In Exhibit D-7 he gave yet another reason by stating that because Srinivasan was not able to maintain himself, he took pity on him and started the business in his name but with his (first defendant's) funds. In his deposition before the City Civil Court he stated that because Srinivasan came to him and he was his brother, he took the licence in his name. All these clearly indicate that the first defendant was not speaking the truth.

19. Then again it is quite unlikely that the first defendant had been consistently making gains in the race course and that too so much gains as would enable him to make the various purchases of properties. He has contended that he never had any business transactions with book makers. As a reason for his avoidance of book makers he stated that if one goes to book makers he would only incur loss at the racecourse. But in Exhibit P-25 he had stated that he earned Rs. 18,000 through book makers. In his deposition during the trial of the suit he admitted that that was correct. Then he stated that he did not have contact with them closely.

20. When confronted with his previous answer, namely, that if he had laid bets through bookies he would have lost heavily, and hence he never did it, he stated: "If we have connection with them on account to bet, then bookies will tempt me to bet on this horse or that horse like that, and so I have to incur loss and so on account of that I did not have connection with them on account". When asked for the name of the bookmaker with whom he had contacts, he said there were about 25 persons, though he cannot mention the name of any one of them for they would

be changing from year to year. All these answers show that his contention that he was making considerable gains at the race course is unbelievable.

21. The admitted facts are that the plaintiff had been living with the first defendant even from the year 1947 or the year 1950 and further the second hotel business which was started was in the plaintiff's name and the first defendant admitted that the plaintiff was helping him in that shop. Further it was the plaintiff who was submitting the sales tax returns for that shop and the ration card was also obtained in the name of the plaintiff in 1965 as admitted by the first defendant and the accounts for the shop were all written in the plaintiff's name. The first defendant further admitted in his evidence that he paid the first premium for the insurance policy which was taken out in the name of the plaintiff from out of the plaintiff's "personal accounts". When asked whether it was from the business funds, he answered "May be, I do not know how he paid." The fact that the licence for the second business was taken out in the name of the first plaintiff as well as the fact that item 3 was purchased in the name of the first plaintiff and no motive has been satisfactorily furnished by the first defendant for having taken out the licence for that shop in the name of the first plaintiff and no motive has been even suggested for the purchase of item 3 benami in the name of the first plaintiff are all indicative of the acquisitions having been made with the income accrued by the joint efforts of the two brothers.

22. Item 1 was purchased under Exhibit D-31, dated 6th April, 1956 for a sum of Rs. 19,000 and out of that consideration Rs. 14,000 was paid in cash and a sum of Rs. 5,000 was adjusted by the execution of a mortgage by the first defendant to the vendor; and subsequently, the mortgage amounts were paid off during the year, 1966. Though the first defendant contends that these payments were made from out of the income from the races, we are unable to accept this contention which was rejected by the learned trial Judge also. This purchase was at a time when the second shop which was a military hotel was yielding profits and the mortgage amounts had been paid off during the time when the second shop was yielding profits.

23. Item 2 was purchased under Exhibit D-62 in the name of Ethirajulu Naidu, the father-in-law of the first defendant and maternal uncle of the first plaintiff and the first defendant, on 20th July, 1966 for a sum of Rs. 7,500. Out of that amount Rs. 5,600 was adjusted towards a mortgage and Rs. 1,900 was paid in cash. The sum of Rs. 5,600 adjusted towards the mortgage included Exhibit D-54 dated 30th November, 1953 which mortgage was standing in the name of the first plaintiff. This would also indicate the mixing up of income.

24. Item 3 was purchased under Exhibit P-46, dated 22nd July, 1969 in the name of the first plaintiff and though it was contended by the first defendant that it was a benami purchase, no motive has been suggested for such a benami purchase. Therefore, undoubtedly, the income accrued by the joint efforts by the brothers had been mixed up with the personal income of the first defendant from the races and these properties had been acquired.

25. The next question is what is the resultant position? We are in entire agreement with the learned trial Judge when he says that the true legal position therefore is that these two brothers will be co-owners and tenants in common and each will be entitled to a half share.

26. Co-ownership is a relationship which springs and slopes from consensus and contract. Legislation has only imprinted on the concept of co-ownership certain rights which have a supervening effect which are declaratory of the rights *inter se* as between co-owners. The legal relationship is always knitted in a framework of jointness and no one therein can predicate with certainty as to what portion of the property held in common is his; and an element of inseparability is inhered in the doctrine of co-ownership. What can be predicated by reason of section 45 of the Transfer of Property Act and by invoking the principle of

quasi trust in the Indian Trusts Act is the quantum of rights of such co-owners in the entirety of the property. Such quantification of rights of each of the co-owners in a given property depends on the facts and circumstances of each case. It is for the purpose of providing a just rule for weighing and appreciating the value or interest of a co-owner in joint property that the rule of equity is evolved in section 45 of the Transfer of Property Act, which runs as follows:—

> "Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property".

Therefore, if the source of the purchase price or the consideration for the investment in a joint enterprise emanates from a common fund, then the shares of each of the co-owners or co-entrepreneurs would be the same as their interest in that common fund. This equitable adjustment of rights is subject to a contract to the contrary. If, therefore, there is evidence that two or more persons purchased the property or an interest in the property, then the rule in section 45 of the Transfer of Property Act would be automatically attracted, unless the parties have contributed otherwise in the matter of their quantum of interest in the joint property. The fact that the property was purchased in the name of one of the co-owners, would not make a serious dent on the above rule of good conscience, provided however it is established by acceptable evidence that such purchase in the name of co-owner was by accident or by consent and that the consideration for such purchase emanates from a common fund. It is this rule of justice equity and good conscience which is reiterated in the Indian Trusts Act by the provisions which deal with quasi trusts as they are styled in legal parlance. In section 94 of the Indian Trusts Act, which is residuary in character, a provision is made to cover cases where the legal and equitable interest are not united in the same person. Section 94 of the Indian Trusts Act provides that the person having possession of property in which he has not the whole beneficial interest must hold the property for the benefit of the other persons having such interest to the extent necessary to satisfy their just demands. Section 95 of the Indian Trusts Act makes the position more clear and highlights the obligations, duties, liabilities and disabilities of such a person holding the property in his name but not having both the legal and the equitable interests united in him. In a proved case of such a holding of property by an individual in his own name, but for the benefit of others, who are also interested in it, the individual has accepted his position as a constructive trustee of such property and he has to hold the same for and on behalf of the person for whom and for whose benefit he holds it. Excepting for certain rights which he has to deal with the said property for the conjoint benefit of himself and other co-owners, he cannot project in himself a title which is inconsistent with or derogatory to the other title of the co-owner. Section 90 of the Trusts Act says "where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing thereof of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property or where any such owner on representing all persons interested in such property, gains any advantage, he must hold for the benefit of all persons so interested the advantage so gained, but subject to"..." It therefore follows that the concept of co-ownership

has certain peculiar rights and liabilities attached to it and that is why it is accepted law that a co-owner cannot even by the mere possessory title of the property in him claim the same by adverse possession. One can be said to hold a property adversely to the other, provided it is open, continuous and public possession which is to the prejudice of the other co-owner. Since such continuous and open and adverse possession by one co-owner against the other is not possible, having regard to the indivisible and well-knit rights of all co-owners of the totality of the property, one co-owner cannot set up an adverse title to the prejudice of the other co-owner, though he may be for all physical purposes incorporeal possession of the concerned property.

27. Such being the accepted notions, which are inextricably connected and annexed to the doctrine of co-ownership, we are unable to agree that, in the instant case, one brother who purchased the property in his name but with a common fund earned by the exertions of himself and his brother, could set up an exclusive title in himself and ward off the just and equitable claims of the other brother in the suit properties.

28. Though strictly speaking, the plaintiff and the first defendant cannot be deemed to have formed a joint Hindu family still where a person acquires certain property with the help of funds which belonged to him jointly with the other and are available in his hands, the co-owners are entitled in equity to the proportionate interest in the newly acquired properties and a suit for partition cannot be resisted merely on the ground that the co-owners do not strictly form a joint Hindu family. (vide *Arokia Manikaran and another* v. *Sowarivaru Manikaran and others*[1].

29. In *Cooke* v. *Head*[2], an unmarried couple acquired a house by their joint efforts for their joint benefit, though the land was acquired by the man in his name for the purpose of building a bungalow for himself and his mistress to set up home together, with the mistress not contributing to the purchase price of the land, but helping the man in the physical work of building the bungalow and contributing to the mortgage instalments and other expenses; and the property was subsequently sold after the couple had separated. It was held that the man held the property on trust for himself and the woman beneficially. It was held that the constructive or resulting trust imposed by the Courts on the legal owner in the case of a husband and wife who by their joint efforts acquired property to be used for their joint benefit, applied to a man and his mistress who acquired property by their joint efforts with the intention of setting up home together.

30. In *Macdonald* v. *Macdonald*[1] a husband and wife lived with the wife's mother in a cottage of which the mother was the tenant for life and the wife was remainderman and the cottage was later sold and out of the proceeds, the mother and the wife contributed funds for the purchase of another dwelling-house, which, however, was purchased in the name of the husband who mortgaged the house as sole mortgagor, in order to raise the rest of the purchase price and the furniture for the new house was provided by the wife and her mother. On the question as to who was entitled to the house, it was held that the Court was satisfied that the wife, the husband and the wife's mother had each a substantial beneficial interest in the house, which was purchased as a joint family enterprise in order to provide a home, and, since no precise calculation of their interests was possible, they should be regarded as having been entitled beneficially in equal shares.

31. In *Bull* v. *Bull*[2], the plaintiff and his mother, the defendant, together purchased a freehold house, the plaintiff contributing a larger part of the purchase price than the defendant and the conveyance was taken in his name; and the money contributed by the defendant was not intended to be a gift from her to the plaintiff and the parties lived together in the house till a particular year

1. (1952) 8 D.L.R. Tr.-Co. 203.
2. (1972) 2 All E.R. 38.

1. (1957) 2 All E.R. 690.
2. (1955) 1 All E.R. 253.

when the plaintiff married and it was arranged then that the defendant should occupy two rooms while the plaintiff and his wife should occupy the rest of the house. Subsequently differences arose between the parties and the plaintiff brought an action for possession of the rooms occupied by the defendant. It was held that since the effect of the purchase of the house was that the plaintiff and the defendant became beneficial tenants in common of the proceeds of sale of the property which was subjected to the statutory trust for sale, the defendant had a right to participate in the enjoyment of the property until it was sold and the plaintiff's action for possession failed.

32. In Halsbury's Laws of England, Third Edition, Vol. 38, page 868, it has been observed that the principle that the property is deemed to be held on a resulting trust applies where several persons purchase property in the name of one; and where, however, two or more persons purchase property in their joint names or transfer property into their joint names, to contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of the purchse or transfer or there are circumstances from which such an intention can be inferred; and if they contributed the purchase-money or property in unequal shares, whether the property is purchased in the name of one or in their joint names, there is a tenancy in common between them in equity, though even in this case the equitable tenancy in common may be rebutted by evidence or circumstances.

33. Snell has observed in his Principles of Equity (Twenty-seventh edition) at page 38:

" (C) *Equal division*:

(1) the principle. In addition to equity's ancient dislike of a joint tenancy the maxim 'equality is equity' may be illustrated by a number of more modern instances. In general, the maxim will be applied whenever property is to be distributed between rival claimants and there is no other basis for division. " I think that the principle which applies here is Plato's definition of equality as a 'short of justice':If you cannot find any other, equality is the proper basis."

34. In the case now before us, it having been proved that the acquisitions of the A schedule properties were made by the joint efforts and with the income accrued from the joint efforts of these brothers, which had been mixed up with the personal income of the first defendant from the races, in the absence of evidence as to what exactly was the contribution made by the respective parties towards these acquisitions and in the absence of any agreement between the two brothers as to their respective interests in the joint acquisitions, the plaintiff will be certainly entitled to his half share in the A schedule properties. We therefore confirm the judgment and decree of the learned single Judge on the original side and dismiss this appeal. (O.S.A. No. 81 of 1975 with costs).

R.S. —— *O.S.A. No.* 81 *of* 1975 *dismissed. A.S. No.* 216 *of* 1971 *and A.S. No.* 615 *of* *abated.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Govindan Nair CJ.* and *A Varadarajan, J.*

S.G. Desai .. *Appellant**

v.

The Director of Education, Government of Pondicherry, Pondicherry .. *Respondents.*

Indian Evidence Act (1 of 1872), section 115—Equitable estoppel—Appellant B.Sc. Graduate with Honours from Karnataka University—Appointed as a Senior Instructor in Chemistry in Motilal Nehru Polytechnic at Pondicherry—Education Department of Pondicherry Government invited applications for the posts of Assistant Professors and Tutors etc.—Qualification for post of Assistant Professors, a first or second class M.A./M.Sc. or B.A. (Hons.)/B.Sc. (Hons.) in the subjects concerned—Appellant applied and appointed as Assistant Professor of Chemistry, Tagore Arts College, Pondicherry—Appointment temporary and liable to reversion at any time—Appellant appointed Examiner by University of Madras for certain examinations, including Chemistry examination for the Pre-University and functioned as such—University of Madras finding appellant to be only a B.Sc., Graduate with (Hons.) and not a B.Sc., (Hons) Graduate, held he was not qualified for the post of Assistant Professor—Appellant was issued show cause notice by the Director of Education Government of Pondicherry—Reply by appellant admitting that he was not qualified for the post of Assistant Professor with request to obtain exemption from the University of Madras for continuing him as Assistant Professor—Reversion of appellant to post of Senior Instructor by the Director of Education Govenment of Pondicherry—Reversion whether liable to be quashed—Principle of equitable estoppel, whether available to the appellant against the Government.

Held, In the present case, there was no representation on the part of the Government of Pondicherry that the appellant had the requisite educational qualification, and the appellant did not proceed on that basis and submit his application for appointment as Assistant Professor. Therefore, it is not open to the appellant to contend that there was any equitable estoppel against the respondent. There is no question of any estoppel, equitable or otherwise, against the respondent. The appellant did not place reliance on any representation by the Government and has not changed his position to his detriment. On the other hand, it was the appellant that made the representation which has since turned out to be incorrect, that he held the B.Sc., (Hons.) degree. On the basis of this representation which appears to have been accepted to be correct without proper verification he was selected as Assistant Professor by the respondent. It is the respondent who had acted to his detriment by acting on this representation on the part of the appellant and there was no change of the position of the appellant to his detriment. On the other hand, the appellant improved his position as Assistant Professor which is a higher post than the post of Senior Instructor at the Polytechnic at Pondicherry, which he had held on the date of his appointment as Assistant Professor. [*Para.* 8.]

The appellant's appointment as Assistant Professor was stated in the order of appointment itself to be purely temporary and he was informed that he may be reverted to his original post as Senior Instructor. The respondent was bound to maintain a standard of qualification necessary for an Assistant Professor in the interest of students, and therefore it owed a duty to the public and consequently the principle of equitable estoppel cannot fairly operate against the respondent. Moreover, the appellant knew the real state of affairs as regards his educational qualification. It would appear from the circumstances of the case that the selection board was not aware that the appellant did not hold the B.Sc. (Hons.) degree which he represented to do in his application for appointment and that the B.Sc. degree which he really had was not equivalent to the B.Sc. (Hons.). degree of the University of Madras. [*Para.* 8.]

*W.A. No. 440 of 1974. 9*th December*, 1977.

In the present case the appellant who had obtained a B.Sc. degree with Hons. after undergoing a 2 years course must have known that he did not hold the B.Sc. (Hons.) degree when he made the application for appointment as Assistant Professor saying therein that he held the B.Sc. (Hons.) degree qualification. Therefore it is not open to him to contend that there is any estoppel, equitable or otherwise, against the respondent. [*Para.* 9.]

Moreover, the appellant had not come to Court with clean hands, for even after impliedly admitting in his letter that he did not possess the requisite qualification, namely an equivalent to B.A. (Hons.) degree of the University of Madras, he requested the Government of Pondicherry to get exemption from the University of Madras to enable him to continue as Assistant Professor without reversion as Senior Instructor in the Polytechnic. He had alleged in the affidavit filed in support of his writ petition that he was a graduate of the Karnataka University with B.Sc. (Hons.) degree in Chemistry and in his explanation he informed the respondent that he was fully qualified for appointment as Assistant Professor in Chemistry according to relevant rules. The appointment of the appellant was purely temporary and he was so informed by the order of appointment itself. Therefore, it would not be open to the appellant to contend that he had a right to the post of Assistant Professor and could not be reverted to his original post. [*Paras.* 10 *and* 11.]

Cases referred to: —

Uma Shankar Misra v. *Board of High School and Intermediate Education, U.P., Allahabad*, A.I.R. 1974 All. 290; *N. Ramanatha Pillai* v. *The State of Kerala*, (1973) 2 S.C.C. 650 : A.I.R. 1973 S.C. 2641; *Mohori Bibee* v. *Dharmodas Ghose*, (1903) I.L.R. 30 Cal. 539 : 30 I.A. 114 : 5 Bom.L.R. 421 : 7 Cal.W.N. 441; *R. Venkata Subbu* v. *The Director of Enforcement New Delhi* (1969) 1 M.L.J. 281; *Issardas* v. *Collector of Madras*, (1959) 2 M.L.J. 136: (1959) M.L.J. (Crl.) 601 : 72 L.W. 726 : A.I.R. 1959 Mad. 528.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ismail, dated 11th April, 1974 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P. No. 353 of 1974 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the proceedings No. 20428-Est.I/D5/2330, Education, from the Director of Education, Government of Pondicherry, Pondicherry and quash the order therein dated 2nd February, 1974 with costs of the petitioner.

M. R. Narayanaswamy, for Appellant.

T. Somasundaram, for Government Pleader, for Pondicherry, for Respondent.

The Judgment of the Court was delivered by

Varadarajan, J.—This writ appeal has been preferred against the order of Ismail, J., dismissing Writ Petition No. 353 of 1974 (P) which had been filed by the appellant to issue a writ of *certiorari* and quash the respondent's order dated 2nd February, 1974 in proceedings No. 20428/Est.I/D5/2330—Education."

2. The appellant had obtained a B.Sc. degree with Hons. from the Karnataka University in 1957. After he had worked in a College at Bellary in Karnataka State fo about 5½ years, he was appointed as a Senior Instructor in Chemistry in Motilal Nehru Polytechnic at Pondicherry on 3rd February, 1965. The Education Department of the Government of Pondicherry invited applications in the newspapers on 19th June, 1968 for the post of Assistant Professors, Tutors etc. The qualification prescribed for the post of Assistant Professors was first or second class M.A./M.Sc., or B.A.(Hons.)/B.Sc. (Hons.) in the subjects concerned. The appellant applied for the post of Assistant Professor and was appointed as Assistant Professor of Chemistry, Tagore Arts College, Pondicherry, by an order, dated 17th July, 1968, which stated that the appointment was purely temporary and that he was liable to be reverted to his

old post at any time. While he continued to function as Assistant Professor, he was appointed as an Examiner by the University of Madras for certain examinations, including the Chemistry Examination for the Pre-University students. While he was functioning as Examiner, some persons who had functioned as Examiners with him, wrote to the University of Madras that he was only a B.Sc., graduate with Hons. and not a B.Sc. (Hons.) graduate and that he had secured appointment as Assistant Professor in the Tagore Arts College, Pondicherry, by misrepresenting his educational qualifications. On these representations, both the University of Madras and the Tagore Arts College, Pondicherry, made enquiries. The Government of Pondicherry was informed by the University of Karnataka that the University had only a B.Sc. degree and not B.Sc. (Hons.) degree in 1957 and that candidates who passed the examination in the First and Second class in that year were declared to have passed the Examination with Honours and it was, however, not equivalent to the B.Sc. (Hons.) degree of the Madras University. After that clarification the Syndicate of the University of Madras resolved to inform the Principal of Tagore Arts College, Pondicherry that the appellant was not qualified for appointment as Assistant Professor. Thereupon, the respondent, the Director of Education, Government of Pondicherry, informed the appellant by notice, dated 4th April, 1973 that as he did not possess a degree equivalent to the B.Sc. (Hons.) or M.Sc. degree of the University of Madras, it was not possible to retain him as Assistant Professor and called upon the appellant to show cause within 15 days of the receipt of the communication why he should not be reverted to his original post of Senior Instructor. In his reply dated 9th April, 1973, the appellant impliedly admitted that he was not qualified to hold the post of Assistant Professor and requested the Government of Pondicherry to obtain exemption from the University of Madras for continuing him as Assistant Professor without reverting him as Senior Instructor. The respondent, however, reverted him by order dated 2nd February from the post of Assistant Professor to his original post of Senior Instructor, which he held prior to his appointment as Assistant Professor in 1968. The writ petition was filed to quash that order dated 2nd February, 1974.

3. In the affidavit filed in support of the writ petition the appellant has stated that he is a graduate of the Karnataka University with B.Sc. (Hons.) degree in Chemistry and that in his explanation dated 9th April, 1973, he informed the respondent that he was fully qualified for appointment as Assistant Professor in Chemistry according to the relevant rules. He denied that there was any suppression of any fact on his part regarding his educational qualification and contended that after verifying his credentials and appointing him as Assistant Professor, it is not just and proper for the Government of Pondicherry to say that he did not possess the requisite qualification. The impugned order dated 2nd February, 1974 does not give any reasons at all for the reversion and is arbitrary and *mala fide*. The respondent has not mentioned the alleged ground of want of necessary qualification in the impugned order as it would be illegal by reason of the principle of equitable estoppel.

4. The respondent contended in the counter-affidavit that the appellant passed off his B.Sc. degree with Hons. as B.Sc. (Hons.) degree, though they were not equivalent. This fact was known only to the appellant and could not be discovered by the Selection Committee with the ordinary care. Therefore, it was not open to the appellant to contend that the respondent is not entitled to question the lack of necessary qualification on the part of the appellant. The appellant did not produce his original degree or even a duplicate thereof, in spite of communications dated 26th May, 1971, 12th June, 1971 and 16th July, 1971 calling upon him to do so, and he stated in his reply, dated 20th July, 1971 that he did not understand the necessity for production of the degree. He was given adequate opportunity to represent his case. In his reply

dated 9th April, 1973 he admitted that he was possessing a degree not equivalent to the B.Sc. (Hons.) degree of the University of Madras, but requested the Government of Pondicherry to take a lenient view and obtain exemption from the University of Madras and permit him to continue as Assistant Professor. He was reverted only for lack of qualification to hold the post of Assistant Professor. Further, the appellant's appointment was purely temporary and in the circumstances the respondent was entitled to cancel his appointment. It is a matter of contract between the parties and the appellant has no right to claim the post of Assistant Professor.

5. Ismail, J., observed in his order that the appellant holding a B.Sc. degree with Hons., obtained after undergoing a two-years course, could not have imagined that he had the B.Sc. (Hons.) degree and considered that he was qualified for applying for the post of Assistant Professor. The learned Judge noted that the appellant's educational qualification was entered as B.Sc. with Hons in his service register. But the learned Judge opined that it is unnecessary to go into the question whether the appellant has misrepresented his educational qualification or not. The learned Judge rejected the contention that there was any equitable estoppel in this case on the ground that there was no representation on the part of the Government of Pondicherry and the appellant did not place any reliance on any such representation and had not charged his position to his detriment. The learned Judge further held that the appellant had been informed by the order of appointment that it was purely temporary and he was liable to be reverted to his old post at any time and that, therefore, it was not open to the appellant to contend that he had a right to the post of Assistant Professor and that there is any equitable estoppel. In this view, the learned Judge held that no interference with the impugned order by exercise of the powers conferred under Article 226 of the Constitution of India was called for, and he dismissed the writ petition without costs.

6. There is no dispute that the educational qualification prescribed in the notice calling for applications for the post of Assistant Professor was First or Second Class M.A./M.Sc. or B.A. (Hons.)/B.Sc. (Hons.) in the subject concerned, that the appellant mentioned his educational qualification in his application for appointment as Assistant Professor as B.A. (Hons.) which appears to have required a three-years course and that, as a matter of fact, he held only a B.Sc. degree with Hons., which could be obtained after undergoing a two-years' course and was not equivalent to the B.Sc. (Hons.) degree of the University of Madras. Nor was it disputed that the appellant impliedly admitted in his letter dated 9th April, 1973 that he did not possess the requisite qualification and that he requested the Government of Pondicherry to obtain exemption from the University of Madras and permit him to continue as Assistant Professor without reversion as Senior Instructor. In these circumstances, we are unable to see how there was no misrepresentation in the application for appointment as Assistant Professor as regards his educational qualification.

7. We find that the appellant has been given all opportunities for representing his case. The final representation made by him was by way of a request to the Government of Pondicherry to obtain exemption from the University of Madras as regards his educational qualification and permit him to continue as Assistant Professor without reversion as Senior Instructor. We are, therefore, unable to accept the appellant's contention that he was not given reasonable opportunities to represent his case. Such a contention does not appear to have been made on his behalf before the learned Judge who dismissed the writ petition.

8. The learned counsel for the appellant relied upon the decision in *Uma Shankar Misra* v. *Board of High School and Intermediate Education, U.P., Allahabad and others*[1] and contended that the Selection

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1. A.I.R. 1974 All. 290.

Committee, which considered the applications for appointment as Assistant Professor, looked into the qualifications of the appellant and appointed him after knowing that he held only the B.Sc., degree with Honours and that the respondent is estopped by the principle of equitable estoppel from contending after a period of six years that he did not have the requisite qualification. That decision will not apply to the facts of the present case. There the petitioner's name was published in the recognised newspapers as having passed the High School Supplementary Examination in 1968. On that basis he proceeded and in due course he passed the B.A. Part I Examination. But in 1971 he was required to show cause why action should not be taken against him for getting undue admission into the intermediate course. There was no evidence to show that the petitioner was guilty of any fraud, misrepresentation, suppression of facts or lack of *bona fides*. In those circumstances it has been held by Prem Prakash J. of the Lucknow Bench of the Allahabad High Court in that case that the Board and the College acted in a manner which amounted to recognition of the petitioner having been duly admitted to the intermediate course of study and that being so, when the Board had remained inactive for a considerable time, the transaction, although originally had become impeachable, has become unimpeachable and the petitioner can legitimately invoke the bar of equitable estoppel against the Board. In the present case, however, there was no representation on the part of the respondent that the appellant had the requisite qualification, and the appellant did not proceed on that basis and submit his application for appointment as Assistant Professor. Therefore, it is not open to the appellant to contend that there was any equitable estoppel against the respondent. There is no question of any estoppel, equitable, or otherwise, against the respondent in this case, for as observed by Ismail, J., there was no representation on the part of the Government of Pondicherry that the appellant had the necessary qualification and the appellant did not place reliance or any such representation and had not changed his position to his detriment. On the other hand, it was the appellant that made the representation, which has since turned out to be incorrect, that he held the B.Sc. (Hons.) degree and it is on the basis of this representation, which appears to have been accepted to be correct without proper verification, he was selected as Assistant Professor by the respondent. It is the respondent who had acted to its detriment by acting on this representation on the part of the appellant, and there was no change of position of the appellant to his detriment. On the other hand, the appellant improved his position by his selection as Assistant Professor which is a post higher than the post of Senior Instructor, which he held on the date of his appointment as Assistant Professor. In *N. Ramanatha Pillai* v. *The State of Kerala and another*[1], it has been observed:

"The High Court was correct in holding that no estoppel could arise against the State in regard to abolition of post. The appellant Ramanatha Pillai knew that the post was temporary. In American Jurisprudence 2nd at page 783 paragraph 123 it is stated:—

'Generally, a State is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in Government. Therefore as a general rule the doctrine of estoppel will not be applied against the State in its Governmental, public or sovereign capacity. An exception however arises in the application of estoppel to the State where it is necessary to prevent fraud or manifest injustice.'"

The estoppel alleged by the appellant Ramanatha Pillai was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the Courts exclude the operation of the doctrine of estoppel, when it is

1. (1973) 2 S.C.C. 650: A.I.R. 1973 S.C. 264.

found that the authority against whom estoppel is pleaded has owed a duty to the public against whom the estoppel cannot fairly operate."

The appellant's appointment as Assistant Professor was stated, in the order of appointment itself, to be purely temporary and he was informed that he may be reverted to his original post of Senior Instructor at any time. The respondent was bound to maintain a standard of qualification necessary for an Assistant Professor in the interest of the students, and therefore, it owed a duty to the public, and consequently the principle of equitable estoppel cannot fairly operate against the respondent. Moreover, the appellant knew the real state of affairs as regards his educational qualification. It would appear from the circumstances of the case that the Selection Board was not aware that the appellant did not hold the B.Sc. (Hons.) degree which he represented to do in his application for appointment, and that the B.Sc. degree with Honours which he really had was not equivalent to the B.Sc. (Hons.) degree of the University of Madras. The Privy Council has observed in *Mohori Bibee v. Dharmodas Ghose*[1]:

"Section 115 of the Evidence Act (I of 1872) does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties."

9. In the present case the appellant, who had obtained the B.Sc. degree with Honours after undergoing a two-years course, must have known that he did not hold the B.Sc. (Hons.) degree when he made the application for appointment as Assistant Professor saying therein that he held the B.Sc. (Hons.) degree qualification. Therefore, it is not open to him to contend that there is any estoppel, equitable or otherwise, against the respondent.

10. Moreover, the appellant had not come to Court with clean hands, for even after impliedly admitting in his letter dated 9th April, 1973 that he did not possess the requisite qualification, namely an equivalent to the B.S.C. (Hons) degree of the University of Madras, he requested the Government of Pondicherry to get exemption from the University of Madras, to which Tagore Arts College where he had been appointed as Assistant Professor was affiliated and permit him to continue as Assistant Professor without reversion as Senior Instructor. He has alleged in the affidavit filed in support of the writ petition that he is a graduate of the Karnataka University with B.Sc. (Hons.) degree in Chemistry and in his explanation dated 9th April, 1973, he informed the respondent that he was fully qualified for appointment as Assistant Professor in Chemistry according to the relevant rules. A Division Bench of this Court in *R. Venkata Subbu and others v. The Director of Enforcement, Enforcement Directorate, New Delhi and another*[1], has observed at page 286 thus:—

"According to the learned Advocate-General, it is very clear that the petitioners have approached the Court with unclean hands, in respect of a discretionary remedy like *certiorari* which is not available *ex debito justitiae*, to a party thus seeking to pollute the very fountains of justice. The maxim *ex turpi causa non oritur actio* applies in this case, and there are ample authorities to support this view. The learned Advocate-General would also place reliance on the other equally well-known maxim, *nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong)".

And at page 293:

"We now come to the ground relating to turpitude. Here, it seems to me that the matter is clear beyond all doubt. The nature of the writ of *certiorari* has been considered in several authorities, and perhaps it is sufficient to refer to the decision of Ramachandra Iyer, J., (as he then was) in

1. (1903) I.L.R. 30 Cal. 539 (P.C.): 30 I.A. 114 : 5 Bom.L.R. 421 : 7 C.W.N. 441.

1. (1969) 1 M.L.J. 281.

Issardas v. Collector of Madras[1]. Undoubtedly, the writ of *certiorari* is issued at the discretion of the superior Court and is ordinarily not a writ of right, except, in the United Kingdom, where the situation is different when the Attorney-General prays for the issue of this prerogative writ. But the law has been stated in Halsbury's Laws of England, Volume XI (Simonds Edition), page 140, in the form that the writ issues *ex debito justitiae*, though it is discretionary.

"......Where it is shown that the Court below has acted without jurisdiction, or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief............

Obviously, here the metaphor of *clean hands* is essential and pertinent. If in relation to the proceedings a party approaches this Court for the issue of a writ of *certiorari* with a record of depravity of conduct intrinsic to the very proceedings, the Court has every right and, indeed, the duty to decline him relief."

We accept the contention of the learned counsel for the respondent that the appellant has not come to Court with clean hands and is not entitled to the discretionary relief of a writ of *certiorari*. It is significant to note that the appellant did not produce the original degree or even a duplicate thereof, in spite of communications dated 26th May, 1971, 12th June, 1971 and 16th July, 1971 calling upon him to do so, and he had stated in his reply dated 20th July, 1971 that he did not understand the necessity for production of the degree. This would show that he was aware that he did not possess the necessary qualification and was, therefore, reluctant to produce his degree or even a duplicate of it, in spite of repeated demands by the respondent.

11. As found by Ismail, J., the appointment of the appellant was purely temporary and he was so informed by the order of appointment itself which stated clearly that he may be reverted to his original post of Senior Instructor at any time. Therefore, it may not be open to the appellant to contend that he had a right to the post of Assistant Professor and would not be reverted to this original post. However, we are inclined to base our judgment more on the ground that the reversion was due to the fact that the appellant, who claimed in his application for appointment as Assistant Professor, to have the B.Sc. (Hons.) degree qualification was found to have no such qualification but held only the B.Sc. degree with Honours for which a two-years course alone was necessary and it was not equivalent to the B.Sc. (Hons.) degree of the University of Madras.

12. There is no merit in this writ appeal and it is accordingly dismissed with costs. Advocate's fee Rs. 250.

R.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Nainar Sundaram, J.*

Pappu Ammal by Agent Pal Nadar ... *Petitioner**

v.

M/s. Lab Chemicals and another ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), section 14 (1) (b)—Requirement of building by landlord for purpose of demolition and reconstruction—Bona fide necessary.

The Legislature was not content to lay down that the landlord can recover possession from the tenant on the simple ground that he required the premises for the immediate purpose of demolishing and putting a new building on the

1. (1959) 2 M.L.J. 136: (1959) M.L.J. (Crl.) 601: 72 L.W. 726: A.I.R. 1959 Mad. 528.

*C.R.P. No. 439 and 440 of 1975. 27th January, 1978.

site. The expression '*bona fide*' has been consciously incorporated so as to enjoin a duty upon the Courts to consider as to whether the requirement of the landlord has got the support of his *bona fides*. [*Para*. 9.]

In the present cases the landlady wanted the building initially for her own use and occupation. The petitions filed to that effect under section 10 (3) (*a*) (*ii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act have been followed by petitions under section 14 (1) (*b*) of the Act. The averments in the petitions under section 14 (1) (*b*) of the Act do refer to the earlier petitions and the averments indicated that the demolition and reconstruction of the building is for her own requirements. It cannot be said that the two claims are contradictory to one another. The Courts below have erreonously taken this as a factor indicating the lack of *bona fides* on the part of the landlady. [*Para*. 14.]

Cases referred to :—

Mohsin Bhai v. *Hale and Com.*, *Madras*, (1964), 77 L.W. 194; *Sha Manakchand* v. *Sankarji Moolchand*, (1965) 2 M.L.J. 12; *David* v. *Daniel*, (1967) 1 M.L.J. 110; *Selvaraj* v. *Narasimha Rao*, (1969) 1 M.L.J. 587; *Smt. C. B. Purshothamadass* v. *P. Mittalal*, (1976) 1 M.L.J. 89 : 89 L.W. 75 : A.I.R. 1976 Mad. 65; *Santhakumari* v. *Narasingha Mudaliar*, (1976) 2 M.L.J. 211; *Pacnamal Narayana Shenoy* v. *Basthi Venkatesh Shenoy*, (1970) 1 S.C.W.R. 406; *Ramachandra Rao* v. *Krishnaswami Iyengar*, (1976) 1 M.L.J. 267; *Ramanatha Iyer* v. *Bathul Bai*, (1971) 2 M.L.J. 383; *Arumugham* v. *National Palayakot Company*, (1973) 2 M.L.J. 380.

Petition under section 25 of the Madras Buildings (Lease and Rent Control) Act XVIII of 1960 as amended by Act XXIII of 1973 praying the High Court to revise the Decree of the Court of Small Causes (III Judge) Madras dated 7th October, 1974 and passed in H.R.A. Nos. 534 and 535 of 1973 respectively). (H.R.C. Nos. 2270 and 2271 of 1971, Court of Small Causes, (VIII Judge) Madras.

O. V. Baluswamy and *Asif Ali*, for Petitioner.

S. V. Kumaraswami and *A. L. Natarajan*, for Respondents.

The Court delivered the following

JUDGMENT.—In these revisions, the landlady is the petitioner. The matters arise out of rent control petitions filed by the landlady under section 14 (1) (*b*) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act). H.R.C. No. 2270 of 1971 was filed by the landlady against M/s. Lab Chemical, the respondent in C.R.P. No. 439 of 1975. H.R.C. No. 2271 was filed by the landlady against P. S. Palani Chetty Respondent in C.R.P. No. 440 of 1975. Both were entertained by the Eighth Judge, Court of Small Causes (Rent Controller) Madras. According to the petitioner she required the premises in the occupation of the respective tenants for the immediate purpose of demolishing the same and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. The case of the petitioner, as could be gathered from the petition filed before the Rent Controller was that her husband was doing business in Ceylon, for some years there have been threats against the Indian merchants in that country to leave, her husband was able to prolong his stay there till recently when he had to migrate to India once for all in May, 1971; her husband after coming to India, has made all preparations to start a business of his own at Madras for the benefit of the family, but for want of a business place for carrying on the business exclusively, the family is handicapped; the petition building is the only non-residential building belonging to them in Madras, that she has also filed separate petitions for eviction of the tenants under section 10 (3) (*a*) (*iii*) of the Act, the shops in the occupation of the tenants are old and narrow and require to be reconstructed. The landlady gave the requisite undertaking to commence the work of demolition of the building, not later than one month and to complete the same before the expiry of the three months from the date possession is recovered. The respondents-tenants filed their counters.

The main contentions, as could be gathered from their counters, are that the landlady has been demanding enhanced rent; she has no means to demolish and reconstruct the building; this building is not old and does not require any demolition: that the landlady has filed another petition for their eviction on the ground of requirement of the building for business purposes and she is not motivated by *bona fides* in filing the petitions for eviction. The Rent Controller who heard the petitions came to the conclusion that the landlady is not motivated by *bona fides* and in that view, dismissed her petition on 30th July, 1973. Aggrieved thereby the landlady filed H.R.A. No. 534 of 1973 against H.R.C. No. 2270 of 1971 and H.R.A. No. 535 of 1973 against H.R.C. No. 2271 of 1971. They were heard and disposed by the Appellate authority (Third Judge, Court of Small Causes, Madras) by a common judgment dated 7th October, 1974. Appellate Authority concurred with the Rent Controller that the landlady lacked *bona fides* and dismissed the appeals, preferred by the landlady. The present revisions are directed against the order of the Appellate Authority.

2. The main question that comes up for consideration in both these revisions is as to whether the Courts below applied the correct principles with reference to the assessment of *bona fides* under section 14 (1) (*b*) of the Act. The question of *bona fides* has passed through many facets of consideration by judicial precedents. It will be pertinent to refer to some of them so as to deduce the correct principle that should be applied in consideration of this question *viz.*, '*bona fides*' of the landlord for seeking eviction under section 14 (1) (*b*) of the Act. In its wisdom, the Legislature was not content to lay down that the landlord can recover possession from the tenant on the simple ground that he required the premises for the immediate purpose of demolishing it and putting a new building on the site. The expression '*bona fide*' has been consciously incorporated so as to enjoin a duty upon the Courts to consider as to whether the requirement of the landlord has got the support of his *bona fides*. Without this element being present and without the consideration of this element, it will be easy for the landlord to apply for eviction under this provision, *viz.*, section 14 (1) (*b*) of the Act.

3. In *Mehsin Bhai* v. *Hale and Com. Madras*[1], Anantanarayanan, J., while considering the question of *bona fides* observed:

"Some regard must certainly be had to the fact that the Act is intended for the protection of tenants, from unjust eviction though the rights of landlords acting *bona fide* are equally safeguarded, and that it will be an abuse of process of Court if any provision of the Act is merely used as a pretext, by the landlord, to obtain the eviction of a tenant, which he could not do otherwise."

4. In *Sha Manakchand* v. *Sankarji Moolchand*[2], Anantanarayanan, O.C.J. considered the question of '*bona fides*' and observed.

"The question of the *bona fide* requirement of a landlord of a building for immediate demolition and reconstruction under section 14 (1) (*b*) of the Madras Buildings Lease and Rent Control Act is sometimes difficult to adjudge and it is impossible to lay down any hard and fast rule. *Bona fides* will be a matter for decision in each case on its own facts and cannot rest upon a mere averment or claim by landlord. It is not the intention of the Legislature that in every case *bona fides* should be presumed unless the tenant establishes *mala fides*."

5. In *David* v. *Daniel*[3], a Division Bench of this Court consisting of Chandra Reddy, C.J., and Natesan, J., had occasion to consider the question of *bona fides* under section 14 (1) (*b*) of the Act. In that decision the law has been stated as follows:

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1. (1964) 77 L.W. 194.
2. (1965) 2 M.L.J. 12.
3. (1967) 1 M.L.J. 110

"The only requirement of section 14 (1) (*b*) is the honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. There is nothing in the language of this clause to warrant the view that the building should be old and decrepit. The expression *bona fide* occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction so as to attract clause (*b*) of section 14 (1). The import of the section is that the desire or the intention to demolish and rebuild should be honestly entertained by the landlord. It should not be a device to evict the tenant....... The fact that the landlords have not decided as to what use they should put part of the building after its reconstruction is not decisive on the question of *bona fide*."

6. In *Selvaraj* v. *Narasimha Rao*[1], a Division Bench of this Court, consisting of Veeraswami, J., and Ramaprasada Rao, J., has laid down the test with regard to the *bona fide* under section 14 (1) (*b*) of the Act. The learned Judges observed:—

"The quality and content of the expression '*bona fide*' appearing in the various sections of the Act and for purposes therein enumerated have to be weighed and construed on different lines under different circumstances having regard to the context in which the expression appears. Section 16 of the Act affords a statutory right to the tenant to reclaim possession of a building secured by the landlord under section 14 (1) (*b*), if he does not substantially demolish the building and attempt at reconstruction as proposed. This controlling provision provides as it were a key to the interpretation of the expression *bona fide* appearing in section 14 (1) (*b*) of the Act. It appears to us that in cases where the claim of the landlord is not *per se* dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunals constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with."

7. The ratio enunciated by their Lordships in the above decision seems to have concluded the controversy with reference to the construction of the expression '*bona fide*' occurring in section 14 (1) (*b*) of the Act. No other decision of this Court, holding a contrary view, has been brought to my notice and I find the said ratio has been uniformly followed by the subsequent judicial precedents of this Court.

8. In *Smt. C. B. Purshothamadass* v. *P. Mittalal*[1], Ramaprasada Rao, J., has reiterated the above ratio in the following terms:

"There is inbuilt in section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act a safeguard under which the tenant could take shelter so as to thwart any pretences on the part of the landlord in the matter of the demolition of the building for purposes of reconstruction. The lever is that the tenant can seek for restitution if the landlord who has to peremptorily give an undertaking as provided for in section 14 (2) fails to demolish the same within the prescribed time. Whatever, reason might prompt an individual to destroy his own property that cannot be the subject matter of investigation by a Court of law. It is in this sense that the halo of *bona fides* which play a very prominent part in so far as petitions under the other sections of the Act are concerned, sinks, to more or less an insignificant level. In view of the fact that the landlord comes forward openly and publicly to demo-

1. (1969) 1 M.L.J. 587.

1. (1976) 1 M.L.J. 89: 89 L.W. 75 : A.I.R. 1976 Mad. 65.

lish and destroy his property, that would not be a case which is automatically illustrative of the *bona fides* of the landlord. In such circumstances, there cannot be any acid test to measure the *bona fides* of the landlord in the matter of such eviction."

9. In *Santhakumari* v. *Narasingha Mudaliar*[1] Suryamurthy, J. observed that *bona fides* is a question of degree; *bona fides* has to be assessed with reference to the circumstances and facts of each particular case and in the context and framework of the situation prevailing at that time. In *Sampathu* v. *Ethiraja Chettiar*[2], Ramaprasada Rao, J. had occasion to refer to the dictum of the Division Bench of this Court in *Selvaraj* v. *Narasimha Rao*[3], and the learned Judge observed:

"It is high time that the Subordinate Judge and the Rent Controller of his District, namely, North Arcot District, apprise themselves of the decision in *Selvaraj* v. *Narasimha Rao*[3], and apply it correctly at least in future. The section itself provides for relief to the tenant, who can remain in the property if the demolition is not made within the prescribed time. This is a statutory benefit conferred on the tenant in the case of any laches on the part of the landlord. Thus viewed, the Courts below ought not to have entered into an adjudication on the issue whether the claim of the landlord in such circumstances was *bona fide* or not."

10. While dealing with a similar provision under the Mysore Rent Control Act, 1961 (Mysore Act XXII of 1961), the Supreme Court in *Pacnaimal Narayan Shenoy* v. *Basthi Venkatesh Shenoy*[4], had occasion to consider the question of *bona fides*. The relevant provision of the Mysore Act, as extracted in the decision reads as follows:

"21. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or other authority in favour of the landlord against the tenant:

Provided that the Court may on an application made to it, make an order for the recovery of possession of a premises on one or more of the following grounds, only, namely.....

(j) that the premises are reasonably and *bona fide* required by the landlord for the immediate purpose of demolishing them and such demolition is to be made for the purpose of erecting a new building in place of the premises sought to be demolished."

The Supreme Court observed as follows:

"What is necessary under that clause is that the landlord must satisfy the Court that he reasonably and *bona fide* requires the premises for the immediate purpose of demolishing it and the demolition is for the purpose of erecting a new building in the place of the old one. No doubt, as to whether the landlord's requirement is reasonable and *bona fide* has to be judged by the surrounding circumstances, which will include his means for reconstruction of the building, and the other steps taken by him in that regard. In considering the reasonable and *bona fide* requirement of the landlord under this clause, the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. In our opinion it is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition..................
So the requirement under clause (j) is that of the landlord and cannot have any reference to the building."

11. In *Ramachandra Rao* v. *Krishnaswami Iyengar*[1], Varadarajan, J. had occasion to deal with a case where the landlord

1. (1976) 2 M.L.J. 211.
2. C.R.P. No. 2524 of 1973 dated 1-10-1974.
3. (1969) 1 M.L.J. 587.
4. (1970) 1 S.C.W.R. 406.

1. (1976) 1 M.L.J. 267.

put forth the specific plea that the building is in very bad state of repairs and required to be immediately pulled down and this case has not been substantiated, but has been found to be otherwise, in that the building has been found to be in a sound condition although it is about 50 years old. In those circumstances, the learned Judge was obliged to negative the *bona fides* of the landlord.

12. In *Ramanatha Iyer* v. *Bathul Bai*[1], Ramanujam, J., while considering a case arising out of an application under section 14 (1) (*b*) of the Act, repelled the contention that whenever an application for demolition and re-construction is made, a prior sanction of the Municipality should have been obtained. The learned Judge observed that the Act nowhere provides that a petition for demolition and reconstruction should be made only after getting the required sanction from the Municipality. In that decision, the learned Judge also discountenanced the proposition that in a notice preceding the action for eviction, the purpose for eviction is sought must be set out.

13. In the light of the above principles it becomes necessary to consider as to whether the Courts below have correctly applied the ratio on the question of *bona fides* under section 14 (1) (*b*) of the Act. Learned counsel appearing for the respondent would suggest that this Court, exercising revisional jurisdiction under section 25 of the Act, shall not re-assess and review this question. Section 25 of the Act is wide enough in giving power to this Court for the purpose of satisfying itself as to the legality, regularity, or propriety of the order or proceeding before the Courts below. This has been recognised by Gokulakrishnan, J. in *Arumugham* v. *National Palayakot Company*[2]. When the Courts below misconstrued the principles to be applied or acted in ignorance of the principles deducible from the judicial precedents of this Court with regard to the question involved, it will be certainly within the ambit of the powers of this Court to correct and annual such improper, irregular and illegal orders.

14. Coming to the question involved in the present cases, the landlady wanted the building initially for her own use and occupation. The petitions filed to that effect under section 10 (3) (*a*) (iii) of the Act have been followed by petitions under section 14 (1) (*b*) of the Act. The averments in the petitions under section 14 (1) (*b*) of the Act do refer to the earlier petition and the averments indicated that the demolition and reconstruction of the building is for her own requirements. It cannot be said that the two claims are contradictory to one another. The Courts below have erroneously taken this as a factor indicating the lack of *bona fides* on the part of the landlady. The fact that she obtained sanction for demolition and reconstruction subsequently is also put against the landlady. The ratio enunciated by Ramanujam, J., in *Ramanatha Iyer* v. *Bathul Bai*[1] discountenances such a consideration to test the *bona fides*. The Courts below found that the landlady has got no means to carry out the work of demolition and reconstruction and her affluence is also taken against her. Another factor which has been taken into consideration by the Courts below in negativing the *bona fides* of the landlady is that in 1962 there was a move by the landlady to get enhanced rent. This may not be a relevant factor to consider the question of *bona fides* in view of the fact that the present petition came to be filed practically a decade later. The anxiety on the part of the landlords to get reasonable rent due to change of times and costs of living and equally so, the tenacity of the tenants to stick on to the old rents, will not always be a relevant factor to adjudge the question of *bona fides* one or the other way. Each case will have to be decided on its own facts. In the present cases, the long time practically waters down this theory, even if that could be tenable under other circumstances. I find that there is no finding rendered by the two Courts below that the building is in a sound condition so that this factor may be taken into consideration to negative the

1. (1971) 2 M.L.J. 383.
2. (1973) 2 M.L.J. 380.

1. (1971) 2 M.L.J. 383.

bona fides of the landlady. On an overall consideration, I find that the Courts below have made a wrong approach to the question of *bona fides* in derogation of the well laid down principles in the judicial precedents of this Court on this question.

15. I find that the order of the Courts below are vitiated and they are improper, irregular and incorrect and accordingly they are set aside and the petitions for eviction filed by the landlady are allowed. These revisions are allowed. There will be no order as to costs in both these revisions.

16. Taking into consideration the facts and circumstances of the case and also the facts that the building concerned is not a residential one. I feel sufficient time should be given to the tenants/respondents in the present revisions to vacate the building in their occupation. Mr. O.V. Baluswami, learned counsel for the petitioner in these revisions, is agreeable for the grant of eleven months time. Hence the respondent in each of these revision petitions is granted eleven months' time to vacate.

R.S. —— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—*S. Mohan, J.*

Villa Venkata Rao .. *Petitioner**

v.

Satyanandam Mummidi and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 47—*The Pondicherry Motor Vehicles Rules—Grant of permit—Factors to be considered—Applicant for permit applying for benefit of moratorium law in another proceeding—Whether disqualified for getting permit.*

If in law a person is entitled to claim a benefit of a moratorium law the fact that he availed himself of the claim would not go to show financial pressure. For what one knows it may be with a view to evade payment and not to avoid payment. [*Para.* 8.]

Then again stronger proof is necessary than a mere affidavit to show that the applicant for permit was under financial pressure. The Tribunal is not a Court of equity but a Tribunal set up under certain rules and regard shall be had only to those criteria mentioned in section 47 of the Motor Vehicles Act and the relevant rules and however desirable it may be to decide the honesty of a person, that is not warranted under the scope of the rules. [*Para.* 9.]

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in M.V. Appeal No. 37 of 1975 on the file of the State Transport Appellate Tribunal, Pondicherry and quash the same.

C. S. Prakasa Rao, for Petitioner.

K.K. Venugopal for *V. Manivannan* and *M. Krishnappan*, for 1st Respondent.

T. Somasundaram, Government Pleader, for Pondicherry, for Respondents 2 and 3.

The Court made the following

ORDER.—This Writ Petition seeks to quash the order of the State Transport Appellate Tribunal, Pondicherry in M.V, A.No. 37 of 1975, dated 19th November. 1976.

2. The petitioner, the applicant No. 1 was granted permit on the ground that he was the existing operator of one bus and as such had an edge over the new entrants. He had maintained his workshop and workshop arrangements on the way. Thus his claims were taken to be superior than the other applicants. Against this order, the matter was taken up in appeal to the Tribunal. The first respondent's appeal is M.V.A. No. 37 of 1975. The Tribunal posed two questions: (1) Whether the grant of permit to respondent-1 is justified; and (2) if not, whether any of the two appellants is entitled to the permit. Concerning this, it was found that the grant of permit made by

*W.P. No. 4490 of 1976. 16*th January*, 1978.

the Regional Transport Authority was not correct, because he did not have the necessary financial stability. On an analysis of the materials before it, it came to the conclusion that, on an overall assessment of the position, the grant made in favour of the writ petitioner who was suffering under financial pressure was not justified. Accordingly, it was set aside. It further proceeded to consider who among the two appellants would be better suited and it came to the conclusion that the first respondent, herein was entitled to the permit because of his financial stability as he had immovable property worth Rs. 40,000 and he was also a new entrant. Hence the present writ petition.

3. Mr. K. Parasaran, learned counsel for the petitioner urges that the reasons adduced by the appellate authority for arriving at a conclusion that the writ petitioner was financially unstable is based upon improper and incorrect reasonings. He would urge merely because, the petitioner had filed an application claiming the benefit of certain moratorium law, which claim was found to be false that does not prove that he was suffering from financial pressure. Equally, the fact that the petitioner was sharing 40 percent of his profits in partnership with his son-in-law however illegal it might be under the law of income-tax assuming that be so, that cannot form the basis for concluding that the petitioner was under financial pressure. In fact, for the assessment year 1975-76, documentary evidence was produced to show that the petitioner was accorded the status of a Hindu undivided family, instead of registered firm, which is proof enough to show that the partnership ceased to exist. Therefore, the insistence on the production of a deed of partnership or any other evidence was wholly unnecessary to hold that such an arrangement would amount to a manoeuvere resulting in a permanent disqualification or a financial pressure, is a perverse reasoning.

4. Mr. K.K. Venugopal, learned counsel for the contesting respondent would however, submits that this is a case in which the fact that there was a suit against the petitioner and he claimed the benefit of certain moratorium falsely alleging that he is a marginal farmer would itself disclose that he was putting forth a dishonest plea, pressed by financial instability. Otherwise, there was no need to claim such a benefit. Therefore, there was *prima facie* evidence before the appellate authority, which evidence that authority can well take into consideration to conclude that he was under financial pressure. Equally, when the petitioner had denied entering into partnership agreement for running Veerabhadra Bus Service with his son-in-law, and later on was confronted with the income-tax returns for the year 1973-74 and 1974-75, that would show that he was attempting to defraud the tax authorities, amounting to dishonesty. It is not merely dishonesty alone that weighed. Such a course became necessary since the petitioner did not have necessary financial stability. The recourse to such methods would be sufficient to show that the petitioner did not have the necessary financial stability.

5. Then again there were suits pending between the petitioner and his son-in-law. Though it was stated that they were withdrawn, no evidence was produced in support of that plea. Where by an overall assessment, the appellate authority found financial instability, this Court exercising writ jurisdiction cannot interfere on a question of fact, since a person like the petitioner who has been dishonest both before the Court and before the income-tax authority cannot be safely entrusted with the public utility service, and rightly therefore the grant made in favour of the petitioner had come to be set aside.

6. In order to appreciate the rival contentions advanced before me, it is necessary for me to note the relevant law which forms the basis for the grant of the permit. Section 47 of the Motor Vehicles Act lays down the various factors to be taken into consideration before the grant of a permit and regard has to be had to the following matters:

" (*a*) the interest of the public generally,
(*b*) the advantages to the public of the service to be provided including the saving of time likely to be effected

thereby and any convenience arising from journeys not being broken;

(c) the benefit to any particular locality or localities likely to be afforded by the service;

(d) the operation by the applicant of other transport services, including those in respect of which application from him for permits are pending;

(e) the condition of the roads included in the proposed route or area."

7. The Pondicherry Motor Vehicles Rules dated 15th December, 1959 state that "the State Transport Authority shall in deciding whether to grant or refuse a stage carriage permit have regard to the following matters in addition to those mentioned in section 47 (1) of the Motor Vehicles Act, 1939". The relevant sub-rule (*iii*) says 'the applicant should have financial stability and must be free from undue financial pressure; and this may be judged from the income-tax returns, solvency certificate, encumbrance certificate." or other appropriate evidence. In this case, fortunately for the petitioner, in no unmistakable terms, the appellate authority has found as follows:

> "It is true that he has got immovable property worth more than a lakh. But it is not the financial-worthiness of a person which should be taken into account, but his financial stability, resulting from his capacity to manage, his estate or his business, in order to ascertain his ability to run smoothly the bus service."

From the above, it will be clear that the Tribunal was drawing niceties between financial-worthiness and stability. Even accepting this as a correct approach, the question to be posed is, has the Tribunal on proper reasons arrived at the conclusion that the petitioner did not have the necessary financial stability.

8. The first point that is put against the petitioner is, he advanced a false plea before Court, in Andhra Pradesh that he was entitled to the benefit of a moratorium law. This according to the Tribunal would show that he was under financial pressure. To use the very words of the Tribunal "the learned counsel for respondent-2 (writ petitioner herein) would say that the respondent-2 was entitled to plead that he was a marginal farmer and nothing else, because such was his position as far as his assets in Andhra Pradesh was concerned and that such plea taken before that Court would have no bearing, on this case." In making such a submission, the respondent-2 is falling from Scylla into Charybdis. If his version is true, he would be an affluent person attempting to take shelter under a provision of law intended to protect poor persons in order to avoid payment of debt contracted by him and making a clear misrepresentation, in a Court of law, disclosing dishonesty which would be a permanent disqualification worse than financial pressure. I therefore consider the affidavit for what it is on the face of it, that is to say a declaration of inability to pay the debt he contracted disclosing financial pressure. "I am hard put to appreciate this reasoning. If in law a person is entitled to claim a benefit of a moratorium law, the fact that he availed himself of the claim could not go to show financial pressure. For aught one knows, it may be with a view to evade payment and not avoid payment.

9. Then again, stronger proof is necessary than a mere affidavit to show that he was under financial pressure. In this connection it is to be remembered that the Tribunal is not a Court of equity, but a Tribunal set up under certain rules and regard shall be had only to those criteria mentioned in section 47 and the rule which I have extracted above. However, desirable it may be to decide the honesty of a person, that is not warranted under the scope of the rules.

10. The second point of attack levelled against the petitioner, and which weighed with the Tribunal, is that for two assessment years 1973-74 and 1974-75 he was assessed to income-tax as a registered firm wherein it was shown that he was sharing profits with his son-in-law. Sharing of the profits with the son-in-law would hardly disclose financial instability. On the contrary, if any person is affluent

enough to share his profits with his son-in-law, that only proves his financial stability. Therefore, that cannot be put against him.

11. Then again, the writ petitioner had filed a valuable evidence by producing the assessment order in respect of 1975-76 which discloses that he was accorded the status of the Hindu undivided family instead of a registered firm. This is proof enough to hold that the contention to the contrary cannot prevail. Nevertheless, the Tribunal insisted upon the production of a partnership deed and evidence as to how the partnership had come to an end. Be it noted that the Tribunal was not concerned with a partnership dispute, but only the financial stability. Again to characterise such a manouvere to as a permanent disqualification worse than financial pressure for being in charge of a public utility service like the operation of a bus route, is to say the least most uncharitable. As I stated above, however desirable it may be to decide the honesty or the conduct of an applicant for a stage carriage permit, the rules do not provide for such an examination and therefore if those considerations had prevailed with the Tribunal, I have to unhesitatingly say that such reasoning is perverse.

12. The last straw which the first respondent herein could clutch at was, there were suits against the petitioner by his son-in-law. The details relating to the suits were lacking. In any event it was said they had been withdrawn or in the process of being withdrawn. Therefore, the Tribunal was not justified in holding against the petitioner on this point. Looked at from any point of view, therefore, the order suffers from various perverse reasonings which I have clearly indicated above. Therefore, this writ petition will stand allowed and the matter is remitted to the Tribunal for fresh disposal in the light of the observations made above, the petitioner will be entitled to his costs. Counsel's fee Rs. 200 to be paid by the contesting respondent.

R.S. —— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT:—*S. Mohan, J.*

S. Duraiswamy Nadar .. *Petitioner**

v.

Additional Special Deputy Collector, (Land Acquisition) Railways, Nagercoil, Kanyakumari District and others .. *Respondents.*

Land Acquisition Act (I of 1894), section 30—Lands belonging to Temple Kattalai trust—Acquisition for Railways—Award passed and compensation fixed—Reference to Civil Court not competent in absence of apportionment of or entitlement to amount.

If there is no dispute relating to ownership or title, the question of apportionment of compensation does not arise. It is not correct to contend that it is purely a ministerial Act. If that were so, just by putting forward an objection it could be said that there is a dispute requiring a reference under section 30 of the Land Acquisition Act. After all, before a reference is made under section 30 of the Act it is necessary to find out whether there is a *prima facie* case made out for reference and not mechanically or in a wooden fashion. The concerned lands belonged to a Kattalai trust of a temple. There was no dispute as to title. The question of apportionment also cannot arise. Nor again would the money be 'payable' to the executive officer of the Temple Devasthanam because the word 'payable', occurring in the section postulates an entitlement to such payment, as otherwise, it would mean that the Land Acquisition Officer is a disbursing authority. Therefore, from any point of view the reference under section 30 of the Act is illegal and will have to be quashed. [*Para.* 7.]

Petition under Article 226 of the Constitution of India, praying that in the

*W.P. No. 4490 of 1976, 18*th January*, 1978.

circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Award No. 1 1976-77 dated 26th April, 1976 passed by the Additional Special Deputy Collector (L.A.) Railways Nagercoil, Kanyakumari District and quash the same."

S. Chellasami, for Petitioner.

N. R. Chandran, for Government Pleader for 1st Respondent.

T. R. Mani, for 2nd Respondent.

The Court made the following

ORDER.—The following lands were acquired under the provisions of the Land Acquisition Act, 1894.

R.S. No. 1228/7	..	20 acres.
R.S. No. 1231/4	..	7 acres.
R.S. No. 1229/4	...	17.5 acres.

These lands belonged to Tiruchendur Subramaniaswamy Koil Sukravara kattalai Trust, represented by Managing Trustee (Doraiswami Nadar), the petitioner herein. The acquisition was for railways. An award was passed on 26th April, 1976 and the compensation fixed in the award was Rs. 13,664.80. The Additional Special Deputy Collector, Land Acquisition (Railways), Nagercoil passed an order to the effect that since there was a dispute relating to the ownership of the property, the matter should be referred to civil Court under section 30 of the Land Acquisition Act, hereinafter referred to as the Act. It is this award which is sought to be quashed in this writ petition by way of *certiorari*.

2. Mr. S. Chellaswamy, learned counsel for the petitioner, submits as under:

3. Section 30 of the Act contemplates a reference to a civil Court only in the event of there being a dispute as to the apportionment of the amount or as to the entitlement to payment to the various persons. In the instant case, there were a number of proceedings by which the title of the petitioner had come to be established. As a matter of fact in O.S. No. 138 of 1971 on the file of the Sub-Court, Tuticorin, which was a suit to modify the scheme framed by the Deputy Commissioner filed by the second respondent herein, it was clearly admitted in favour of the writ petitioner who was arrayed as the first defendant that the property belonged to the specific endowment *viz.*, Sukravara kattalai. In paragraph 17 of the judgment in O.S. No. 138 of 1971 what is stated is this:

> "In the plaint the plaintiff has not mentioned that there are properties other than the properties mentioned in the plaint. It is not disputed that the suit properties mentioned in the plaint. It is not disputed that the suit properties mentioned in the plaint belong to this specific endowment."

Added to this, there was no issue concerning the title relating to these properties. Again, patta was issued under the provisions of the Tamil Nadu Act XXXI of 1964 as early as 17th July, 1969. These proceedings are conclusive and binding as between the parties which will prove beyond every iota of doubt that the title to the properties had come to be vested with the petitioner. Merely because an appeal has been preferred against the judgment in O.S. No. 138 of 1971 in A.S. No. 735 of 1974 to this Court, that does not *ipso facto* render the position fluid. In other words, that does not mean that there is a dispute relating to the ownership since in the suit there was no dispute at all to the title which was admitted. Nor again any issue was framed to that effect in the suit. Therefore, the reasoning given by the Additional Special Deputy Collector (L.A.), Railways, the first respondent herein for making a reference under section 30 of the Act is totally erroneous.

4. Learned Government Pleader points out that since there is a dispute relating to the apportionment of compensation, a reference under section 30 of the Act had to be made which is only a ministerial act and the Land Acquisition

Officer has no power to decide the question of title especially when it is disputed. That is precisely the reason why a reference is made to the civil Court for a proper adjudication thereof which alone is entusted with the jurisdiction.

5. Mr. T. R. Mani, learned counsel for the 2nd respondent would, however, submit that there is no dispute that the properties belong to the Trust, but as an Executive Officer, the third respondent will be entitled to manage the trust and therefore he would be entitled to be paid the compensation under section 30 of the Act. If that be so, there is a dispute relating to the ownership or title to the property. Looked at from this point of view, this order is unassailable. In any event, according to him, having regard to sections 31 and 32 of the Act, if the compensation is payable only to the Trust, then the proper remedy would be to deposit the sum into Court and therefore, from that point of view, at least, the directions to deposit could be upheld.

6. There is absolutely no doubt in this case, that by proceedings more than one, the title of the writ petitioner has come to be established very clearly. First of all, I may refer to O.S. No. 138 of 1971. That was a suit filed by the present respondents 2 and 3 wherein the writ petitioner was arrayed as the first defendant for the relief of modification of the scheme framed by the Deputy Commissioner and subsequently confirmed by the Commissioner, Hindu Religious and Charitable Endowment Department. The following issues were framed for trial:

"1. Whether this Court has jurisdiction to entertain this suit?

2. Whether the suit is in time?

3. Whether the scheme framed in A.S. No. 442 of 1091 M.E. by the High Court, Travancore, is not valid and binding on the plaintiff?

4. Whether the modifications by the plaintiff for the scheme in question are necessary to be made?

5. Whether the said scheme is opposed to the Hindu Religious and Charitable Endowment Act.?

6. Whether the plaintiffs are entitled to sue in a representative capacity under Order 1, rule 8, Civil Procedure Code?

7. Whether the election of the defendants 1 and 2 as trustees for life is invalid?

8. Whether the temple authorities have any right to manage the affairs of the trust which is an endowment for specific purpose of performing the Sukravara kattalai which is only to be managed by the trustees duly elected?

9. To what relief, if any, are the plaintiffs entitled?"

Relating to issue No. 1, the learned Subordinate Judge states in paragraph 7 thus:

"This suit relates to a specific endowment attached to Sri Subramaniaswamy Temple, Tiruchendur which temple is situate within the jurisdiction of this Court. The suit is filed under section 70 of the Tamil Nadu Act XXII of 1959 which is herein called as the Act for brevity sake."

Then again, the learned Subordinate Judge proceeds to state as follows:

"The suit properties belong to the specific endowment which is now attached to Sri Subramaniaswamy Temple, Tiruchendur. The charity, *viz.*, Sukravara kattalai, for which the suit properties are endowed, has to be performed only at Sri Subramaniaswamy temple, Tiruchendur which is within the jurisdiction of the Sub-Court, Tuticorin. As the claim relates to the administration of the trust *i.e.*, the administration of the said specific endowment which relates to the performance of Sukravara kattalai at Sri Subramaniaswamy temple at Tiruchendur, a part of the cause of action arises at Tiruchendur within the jurisdiction of this Court."

In paragraph 17 of his judgment, in unmistakable terms, the learned Judge holds thus:

"In the plaint the plaintiff has not mentioned that there are properties other than the properties mentioned in the plaint. It is not disputed that the suit properties mentioned in the plaint belong to this specific endowment."

However, the learned Subordinate Judge proceeded to hold in paragraph 18 of his judgment thus:

"In view of the fact that specific endowment is possessed of considerable extent of properties at Tiruchendur and in Nagercoil and in view of the fact that the trustees and honorary trustees, it would be better to appoint an Executive Officer in the interest of efficiency in the administration of specific endowment. It would be better to appoint a whole-time Officer as an Executive Officer for the collection of income, maintenance of accounts and other matters relating to day-to-day administration as it will not be possible for honorary trustees to attend to such details."

Ultimately, the scheme came to be modified. This judgment has been taken up in appeal to this Court in A.S. No. 735 of 1974. The fact of preferring this appeal as well as the cross-appeal seems to have weighed with the first respondent herein very much. But, in my view that can have no bearing over a decision whether a reference under section 30 of the Act has to be made or not. As found categorically by the learned Subordinate Judge that as there was no dispute relating to the title or ownership, the fact that an appeal has been preferred with reference to certain modification of the scheme or again a cross-appeal has been filed will be totally immaterial. Therefore, that reasoning made under the impugned order will have to be ignored.

7. Not only this. Under the Tamil Nadu Act XXXI of 1964 by proceedings of the Settlement Tahsildar, Sri Pandaravaka Unit II, Nagercoil, dated 17th July, 1969, patta was issued in the name of the petitioner Duraisami Nadar and one Ramanatha Nadar. What is stated in paragraph 4 of the proceedings of the Settlement Tahsildar, Sri Pandaravaka Unit No. II, Nagercoil, reads thus:

"Enquiry reveals that the title to the lands has been established in the name of the claimant temple. Under the powers delegated to me in G.O. Ms. No. 1282, Revenue, dated 4th July, 1967. I hereby order under section 9 (2) read with section 8 (1) of the Kanyakumari Sreepandaravaka Lands (Abolition and Conversion into Ryotwari, Act XXXI of 1964, that a ryotwari patta be issued for the R.S. No. 1199/5, 0.96 cents, 1195/7, 0·88 cents ; 1238/12 acres, 27 cents ; 1197/8, .0.82 cents ; 1196/10, 1 ac. 62 cents ; 1186/11 acre 22 cents, 1189/12, 0.74 cents ; 1228/7, 0.50 cents, 1229/4, 0. 43 cents ;1226/2, 0.69 cents ; 1185/3 0.28 cents ; 1199/4, 1 acre 24 cents ; 1197/2, 0.98 cents; 1231/4, 0.17 cents and 1188/10, 1 acre 60 cents in the name of the "Tiruchendur Subramaniaswamy Sukravara Kattalai Vagai", represented by the present Trustees Duraiswamy Nadar and Ramanatha Nadar."

It requires to be noted here that the lands forming the subject-matter of the acquisition are covered by this patta. In fact, the Additional Special Deputy Collector (L.A., Railways), the first respondent herein, himself notes that when he says as per patta No. 7464 of Aloor Village. It may be that the Executive Officer has right to manage the properties but the right of management does not mean that there is an entitlement to be paid so as to fall under the latter half of section 30 of the Act. If there is no dispute relating to ownership or title, the question of apportionment does not arise. It is not correct on the part of the learned Government Pleader to contend that it is purely a ministerial act. If that were so, just by putting forward an objection, it could be said that there is a dispute requiring a reference under section 30 of the Act. After all, before a reference is made under section 30 of the Act it is necessary to find out whether there is a *prima facie* case made out for reference and not mechani-

cally or in a wooden fashion. In the instant case, there is no dispute as I said above, as to the title. The question of apportionment also cannot arise. Nor again, the money would be payable to the Executive Officer because the word 'payable' occurring in the section postulates an entitlement to such payment. As otherwise it would mean that the Land Acquisition Officer is a disbursing authority. Therefore, looked at from any point of view, reference under section 30 of the Act is illegal and therefore will have to be quashed. It is entirely a different matter whether the procedure under section 31 or 32 of the Act will have to be followed or not. I am not called upon to decide the same since the reference here very clearly states that it had been made only under section 30 of the Act. Accordingly, the writ petition will stand allowed. There will be no order as to costs.

R.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—*S. Nainar Sundaram, J.*

Reethalammal .. *Petitioner**

v.

K. Arumugham Pillai and others .. *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1970) as amended by Act (XXIII of 1973), sections 10 (2) (i), 10 (2) (ii) (a)—Landlord's petition for eviction of tenant —Allegations of subletting and wilful default—Eviction ordered by Rent Controller—Appellate Authority reversing findings—Revision to High Court—Subletting without consent of landlord—Whether eviction could be ordered.

Subletting is made a ground for seeking eviction of the tenant by the landlord. Consent by landlord for such sub-letting would provide a cover for the tenant. It may be expressed or implied provided it is in writing. Subletting done during the tenure of a lease under a previous landlord and without his written consent can be availed of by a subsequent purchaser from the previous landlord to seek eviction of the tenant. Though in some decisions acquiescence by the landlord was countenanced as a defence available to the tenant, other decisions have discountenanced it and they have held that there is no question of acquiescence or estoppel against the landlord as that would practically be an estoppel against the statute. [*Para.* 21.]

In the present case, a specific case as put forth by the first respondent was that prior to the assignment in favour of the petitioner the first respondent had let the building to respondents 3 to 5 on a monthly rent and therefore the petitioner was not competent to object to it. The sub-lease had admittedly been done without the consent of the landlord. When once subletting is admitted and when once it is found there is no sanction or the written consent of the landlord, the tenant cannot escape the consequences of the eviction which must eventually follow. [*Paras.* 22, 23.]

Cases referred to:

Mohammed Haji v. *A Moshin Raja*, (1948) 61 L.W. 387 (2) : (1948) 1 M.L.J. 456 : A.I.R. 1948 Mad. 440 ; *P. Ranganathan* v. *Sankarlal Davey*, (1949) 2 M.L.J. 597 : A.I.R. 1950 Mad. 139 ; *V. Somasundara Mudaliar* v. *The Madras Provincial Co-operative Society Ltd.*, (1950) 1 M.L.J. 655 : 63 L.W. 610 : A.I.R. 1950 Mad. 711 ; *Gokaldas Dahyabhai* v. *Jiva Raghav*, A.I.R. 1955 Sau. 52 ; *P.A. Aiyamath Chetty* v. *V. Pala Muddu Krishnayya and Co.*, (1956) 2 M.L.J. 54 : 69 L.W. 282 ; *Jafar Ali* v. *Chaitram*, (1957) 1 An.W.R. 348 : (1957) 1 An.L.T. 399 ; *S. Arputam Chettiar* v. *C.P. Narayana Rao*, (1962) 75 L.W. 523 ; *T.S.O. Abdul Khader* v. *G.H. Rao*, (1964) 2 M.L.J. 288 ; *P.M. Jagadisa Mudaliar* v. *N.C.C. Angappa Mudaliar*, (1966) 79 L.W. 615 ; *Kannappa Chettiar* v. *Veerasami*, (1972) 1 M.L.J. 184 : 85 L.W. 192 : A.I.R. 1972 Mad. 303 ; *P.J. Gupta & Co.* v. *M. Venkatesan*, (1975) 1 S.C.C. 46 : A.I.R. 1974 S.C. 2331 ; *Poorna Chand* v. *Motilal*, A.I.R. 1964 S.C. 461 ; *Gappulal*

* C.R.P.No. 469 of 1975.

3rd February, 1978.

v. *Thakurji Shriji Dwarkadheeshi*, (1969) 2 S.C.J. 810 : (1969) 1 S.C.C. 792 : A.I.R. 1969 S.C. 1291; *Jagan Nath* v. *Abdul Aziz*, A.I.R. 1973 Delhi 9.

Petition under section 25 of Act XVIII of 1960 and as amended by Act XXIII of 1973 praying the High Court to revise the Order of the Rent Control Appellate Authority (Principal Subordinate Judge), Tirunelveli, dated 19th August, 1974 and made in C.M. A. No. 42 of 1973 (H.R.C. O. P. No. 2 of 1973, District Munsif Court (Rent Controller), Tenkasi).

T.R. Mani and *R. Nandakumar*, for Petitioner.

K. Ramamurthi, for Respondents.

The Court delivered the following

JUDGMENT.—The landlady under the Tamil Nadu Act XVIII of 1960 (hereinafter referred to as the Act) is the petitioner in this revision. The first respondent was the tenant and respondents 2 to 5 are arrayed as sub-tenants. The landlady filed a petition for eviction before the Rent Controller (District Munsif) Tenkasi, H.R.C.O. P. No. 2 of 1973 under section 10 (2) (i) and section 10 (2) (ii) (*a*) of the Act. Certain facts not in dispute may be stated. The premises originally belonged to the first respondent and he othied the same in favour of one Ganapathi Joshier for Rs. 1,500 on 30th July, 1969 under Exhibit A-1. The first respondent himself took the building on lease from the said Ganapathi Joshier under Exhibit A-2. Under Exhibit A-2 the rate of rent reserved was Rs. 15 per month for a period of three years and thereafter, the rent was to be paid at the rate of Rs. 22.50 Ps. On 15th November, 1972, the said Ganapathi Joshier assigned the othi in favour of the petitioner for Rs. 1,500. The petitioner pursuant to the assignment asserted her rights as 'landlord' and demanded the rents and followed it up by the action for eviction referred to above. The petition for eviction was contested in the main by the first respondent and he would contend that prior to the assignment in favour of the petitioner on 15th November, 1972, he (1st respondent has sub-let the building to respondent 3 to 5 and that it is not correct to say that he has agreed to pay a monthly rent of Rs. 22.50 to Ganapathi Joshier.

2. The Rent Controller who heard the matter, came to the conclusion that the tenant committed wilful default in the payment of rents and has further sub-let the building without the written consent of the 'landlord' and hence, he is liable to be evicted along with the other respondents. The first respondent appealed in C.M.A. No. 42 of 1973, which came to be heard and disposed of by the Subordinate Judge (Appellate Authority), Tirunelveli by an order dated 19th August, 1974. The appellate authority reversed the findings of the Rent Controller and dismissed the petition for eviction preferred by the petitioner. As against the said order, the present Revision is filed.

3. Thiru T.R. Mani, learned counsel for the petitioner would urge that the order of the appellate authority is vitiated by impropriety and irregularity in that the correct principles with regard to the question of wilful default and sub-letting have not been followed by the appellate authority.

4. As stated above, two grounds were put forth for eviction of the tenant, *viz.*, wilful default and sub-letting.

5. Before I deal with the aspect of wilful default, it is better to deal with the question of sub-letting because the counsel for the both sides have placed before me a number of authorities on this question.

6. The ground of sub-letting must satisfy the provisions of section 10 (2) (ii) (*a*) of the Act, which reads as follows :—

"that the tenant has after the 23rd October, 1945 without the written consent of the landlord, transferred his right under the lease or sub-let the entire building or any portion thereof, if the lease does not confer on him any right to do so". On the question of "consent", decisions have been rendered both under the old statute and the present statute and there are also decisions

which have arisen under similar statutes of other States.

7. In *Mohammed Haji v. A. Moshin Raja*[1] Happell, J., was concerned with a case where sub-letting had taken place before the commencement of the Madras Act XV of 1946, and held that the tenant cannot be evicted on that ground. It must be pointed out that under Madras Act XV of 1946, which came into force on 1st October, 1946, clause (2) of section 7 enabled the landlord to seek eviction of the tenant, if the sub-letting had taken place after the commencement of the Act without his written consent.

8. In *P. Renganatham v. Sankarlal Davey*[2] Rajamannar, C.J., and Krishnaswamy Nayudu, J., in a case which arose under Madras Act (LV of 1946), held that the landlord is entitled to obtain an order for eviction of the tenant if the tenant has, after the commencement of the Act without the consent of the landlord, transferred his right under the lease or sub-let the entire or any portion of the lease building, and if therefore, there is a transfer or sub-letting after the commencement of the Act, the tenant can be saved by a written consent of the landlord from the consequence, namely, eviction.

9. In *V. Somasundaram Mudaliar and another v. The Madras Provincial Co-operative Society Limited and another*[3] Rajamannar, C.J., and Somasundaram, J., reiterating the basis of that sub-letting without the written consent of the landlord after the commencement of the Madras Act XV of 1946 would afford a ground for eviction, extended the principle by saying that a subsequent purchaser from the landlord can avail himself of *that* sub-letting and file a petition. The learned Judge further held that if there was a change in the sub-tenant after the commencement of the Act, that would constitute subletting after the commencement of the Act within the meaning of the said statutory provision.

10. A Division Bench of the Saurashtra High Court in *Gokaldas Dahyabhai v. Jiva Raghay and another*[1], held that where a sub-lease was already subsisting when the Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII of 1947) was applied to Saurashtra, it could not be said that the tenant created any fresh sub-lease after the commencement of that Act by merely recovering rent under the subsisting sub-lease.

11. In *P.A. Aiyannath Chetty and others v. V. Pala Muddukrishnayya and Co., Madras*[2], Somasundaram, J., was concerned about the amendment introduced by the Madras Act VIII of 1951 to section 7, Sub-clause (2) of the Madras Act XV of 1964, by virtue of which, for the words figures and letters "After the 23rd October, 1945" were substituted. The learned Judge while recognising the principle of the non-consent of the landlord in writing will entail eviction repelled the argument that the landlord is estopped by his conduct, on the principle that there can be no estoppel against a Statute. In that case, an argument was put forth that the 'landlord' must be considered to have acquiesced or contracted out of the Statute waiving his privileges under the Statute. The learned Judge *assuming* that there can be a waiver, considered the question as to whether there is such a waiver and on the facts of that case, held that there was no such waiver.

12. In *Jafer Ali v. Choitram*[3] Jaganmohan Reddy, J., as he then was, laid down the principle as follows :—

A tenant can sub-let the house with the oral consent of the landlords under the Hyderabad Houses Rent Control Order, 1353 Fasli, but under the Hyderabad Houses (Rent, Eviction and Lease) Control Act, that can be done only with the written consent of the landlord. The

1. (1948) 61 L.W. 387 (2) : (1948) 1 M.L.J 456 : A.I.R. 1948 Mad, 440.
2. (1949) 2 M.L.J. 597: 62 L.W. 814: A.I.R. 1950 Mad. 139.
3. (1950) 1 M.L.J. 655 : A.I.R. 1950 Mad. 11 : 63 L.W 610.

1. A.I.R. 1955 Saur. 52.
2. (1956) 2 M.L.J. 54 : 69 L.W. 282.
3. (1957) An.L.T. 399 : (1957) 1 An.W.R. 348.

present Act has no retrospective operation so as to invalidate a sub-tenancy created, long prior to the coming into force of the present Act, with the oral consent of the landlord.

13. In *S. Arputam Chettiar* v. *C.P. Narayana Rao*[1], Srinivasan, J., was concerned with the question as to whether if the tenant had the authority to sub-let the premises prior to the passing of the Act, such authority would be deemed to have continued and that no further written consent to authorise such sub-letting was necessary after the passing of the Act. The learned Judge referred to a decision of Ramachandra Iyer, O.C.J., as he then was in C.R.P. No. 1247 of 1960, where it was laid down that if the original terms of the tenancy authorised the tenant to sublet and if the landlord had acquiesced in such sub-letting it could be presumed that there was such authority and that the landlord could not, therefore, put this forward as a ground for eviction. Srinivasan, J., on the facts of the case dealt by him, found that there was no evidence of such authority.

14. In *T.S.O. Abdul Khader* v. *G.H. Rao*[2], Ramakrishnan, J., had occasion to consider the provisions of section 10 (2) (*ii*) (*b*) of the Tamil Nadu Act XVIII of 1960, with reference to the use of the premises let for a purpose other than that for which it was leased. The learned Judge repelled the arguments with reference to the acquiescence by the landlord or estoppel by conduct and held that any kind of acquiescence by the landlord or estoppel by his conduct cannot be a substitute for the plain requirements of the Statute about a written consent.

15. In *P.M. Jagadisa Mudaliar* v. *N.C.C. Angappa Mudaliar*[3] Venkatadri, J., reiterated the principle with reference to obtaining the written consent of the landlord for sub-letting so that it can be a defence open to the tenant when eviction was sought against him on the ground of such sub-letting. The learned Judge laid down the principle as follows:—

> "The provisions of Act XVIII of 1960' in section 10 (2) (*a*) requires that the written consent of the landlord should be obtained. Therefore, it is immaterial whether the previous landlord gave permission to the tenant to sub-let the premises. The tenant must obtain the written consent of the landlord for the purpose of sub-letting. Where there is a change in the sub-tenancy and when new persons are introduced into the premises by the main tenant, he should obtain the written consent of the landlord for sub-letting the premises. Even assuming that the original agreement permitted the main tenant to sub-let the premises, that agreement would not bind the subsequent purchaser of the premises. Even though the landlord tacitly allowed the tenant to sub-let the premises, still the landlord can at any time take advantage of the provisions of the Act for evicting the tenant on the simple ground that the tenant has not obtained the written consent of the landlord for sub-letting the premises."

16. The same principle has been recognised by Sadasivam, J., in *Kannapa Chettiar* v. *Veerasami*[1], when the learned Judge, stated that a tenant cannot without the written consent of the landlord transfer his rights under the lease and sub-let the entire building or part thereof, if the lease does not confer any right to do so and if the tenant sub-lets without complying with the above requirement, he will come within the mischief of section 10 (2) (*ii*) (*a*) of the Tamil Nadu Act XVIII of 1960.

17. In *P.J. Gupta and Co.* v. *M. Venkatesan, Merchant and others*[2], the Supreme Court dealing with a case which arose under the Tamil Nadu Act (XVIII of 1960), observed as follows:—

> "The provisions of the Act apply to all tenancies. A tenancy is essentially

1. (1962) 75 L.W. 523.
2. (1964) 2 M.L.J. 288.
3. (1966) 79 L.W. 615.

1. (1972) 1 M.L.J. 184 : 85 L.W. 192 : A.I.R. 1972 Mad. 303.
2. (1975) 1 S.C.C. 46 : A.I.R. 1974 S.C. 2331.

based on and governed by an agreement or contract even when a statute intervenes to limit the area within which an agreement or contract operates, or subjects contractual rights to statutory rights and obligations. Where the tenant has sub-let in 1957, *i.e.*, subsequent to 1945, the case would be covered by section 10 (2) (*ii*) (*a*) and he would be liable to be evicted."

18. In *Poorna Chand* v. *Motilal and others*[1], the Supreme Court was concerned with the provisions of Delhi and Ajmer Rent Control Act (XXXVIII of 1952) and in particular section 13 (*i*) of the Act, the material part of which reads as follows :—

"Notwithstanding anything to the contrary contained in any other law or any contract, no decree or order for the recovery of possession of any premises shall be passed by any Court in favour of the landlord against any tenant (including a tenant whose tenancy is terminated) ; provided that nothing in this sub-section shall apply to any suit or other proceeding for such recovery of possession if the Court is satisfied: (*a*) that the tenant has neither paid nor tendered the whole of the arrears of rent due within the month of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the manner provided in section 106 of the Transfer of Property Act (IV of 1882); or (*b*) that the tenant without obtaining the consent of the landlord in writing has, after the commencement of this Act, (i) sub-let, assigned or otherwise parted with the possession of, the whole or any part of the premises.........."

19. It was held as follows :—where admittedly after the execution of the lease deed, the tenant has sub-let some of the rooms of the building to others without obtaining the written consent of the landlord, section 13 (1) (*b*) (i) applies. The fact that there were sub-tenants in the said portions and new ones were substituted for them, could not conceivably be of any help to the tenant, because the new sub-tenants were not holding under the earlier sub-tenants, but were inducted by the tenant after the earlier sub-tenancies were terminated. The tenant, having sub-let part of the premises without the consent of the landlord in writing, cannot invoke the protection given to him under section 13 of the Act.

20. In *Goppulal* v. *Thakurji Shriji Dwarkadheeshi and another*[1], the Supreme Court was concerned with the provisions of Rajasthan Presmises (Control of Rent and Eviction) Act (XVII of 1950). Section 13 (1) (*e*) sets out sub-letting as a ground for ejectment in the following terms :—

"That the tenant had assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord".

The Supreme Court observed :—

"The question whether a sub-letting before the coming into force of the Act is within the purview of clause (*e*) of section 13 (1) depends upon the construction of that clause. The relevant words are 'has sub-let'. The present perfect tense contemplates a completed even connected in some way with the present time. The words take within their sweep any sub-letting which was made in the past and has continued up to the present time. It does not matter that the sub-letting was either before or after the Act came into force. All such sub-lettings are within the purview of clause (*e*)".

21. From a discussion of the above authorities, certain principles do emerge out. Sub-letting is made a ground for seeking eviction by the landlord. Consent by landlord for such sub-letting would provide a cover for the tenant. It may be expressed or implied provided it is in writing. Sub-letting done during the tenure of a lease under a previous landlord and without his written consent can

1. A.I.R. 1964 S.C. 461.

1. (1969) 2 S.C.J. 810 : (1969) 1 S.C.C. 792 : A.I.R. 1969 S.C. 1291.

be availed of by a subsequent purchaser from the previous landlord to seek eviction of the tenant. Though in some decisions acquiescence by the landlord was countenanced as a defence available to the tenant, other decisions have discountenanced it and they have held that there is no question of acquiescence or estoppel against the landlord and that would practically be a estoppel against the statute. In my view, the second line of decisions are in consonance with the language used in the provisions of the Act. To repeat the dictum of Ramakrishnan, J., in *T.S.O. Abdul Khader* v. *G.H.Rao*[1], "any kind of acquiescence by the landlord or estoppel by his conduct cannot be a substitute for the plain requirements of the Statute about a written consent." A change of sub-tenant after the relevant date without the written consent of "landlord" will entail eviction. Keeping the above principles in the background, we have to see as to whether the decision of the appellate authority has conformed to the same.

22. Coming to the facts of the present case, I find that the specific case as put forth by the 1st respondent is that prior to the assignment in favour of the petitioner on 15th November, 1972 the 1st respondent has sub-let the building to respondents 3 to 5 on monthly rent and therefore, the petitioner is not competent to object to it. It appears that in the course of the arguments before the Rent Controller, it was contended on behalf of the 1st respondent that he sub-let the building even before the othi deed Exhibit A-1 dated 30th July, 1969. This contention runs *contra* to the specific plea taken by the 1st respondent in the counter. I do not find that any material has been placed before the Courts below to substantiate the later contention. Hence, we have to take it that the sub-lease has admittedly been done after the othi deed under Exhibit A-1 dated 30th July, 1969 and the rent deed Exhibit A-8 of the same date and before the assignment under Exhibit A-2 dated 15th November, 1972. Equally so, the 1st respondent has not obtained the written consent of the 'landlord' either Ganapathi Joshier or the present petitioner for such sub-letting. The appellate authority sets out the contention of the 1st respondent that the tenants were already there even at the time when Ganapathi Joshier got Exhibit A-1 othi, when he entered into a lease back arrangement under Exhibit A-8 on the same date. The appellate authority observed as follows towards the end of paragraph 9 of his order.—

"The 1st respondent herein as petitioner before the lower Court was very well aware of the sub-lease even at the time of her getting the assignment and in such circumstance, it should be taken that a sub-lease was done even earlier to the assignment in favour of the 1st respondent rgarding the othi and so there is no question of any sub-lease without the consent of the landlady."

23. This is a misconception of the case of the parties. Not only, the appellate authority has misconceived the case of the parties, but has not applied the correct principles of law governing the question of sub-letting under the Act. When once sub-letting is admitted and when it is found that it has no sanction of the written consent of the "landlord" the tenant cannot escape the consequences of eviction, which must eventually follow. Hence, I find that the order of the appellate authority suffers from an impropriety in the application of the law to the facts of the case.

24. Thiru K. Ramamurthy, learned counsel for the respondent would reply on the ratio by Kailasam, J., as he then was in C.R.P. No. 639 of 1973, wherein the learned Judge considered the question of the knowledge of the landlord with reference to the use of the premises for a purpose other than that for which it was leased in the context of section 10 (2) (ii) (*b*) of the Act. The learned counsel for the respondent also relies on the decision in *Jagan Nath* v. *Abdul Azia and others*[1]. There the learned Judge of the Delhi High Court was considering a similar provision

1. (1964) 2 M.L.J. 288.

1. A.I.R. 1973 Delhi 9.

of Delhi Rent Control Act (LIX of 1958) and held that the consent may be express or implied, and either would be sufficient provided that it is in writing. The learned counsel for the respondent would contend that knowledge would amount to acquiescence. There may be a need to consider this question if the materials on record do make out that the "landlord" had knowledge about the sub-letting earlier and had acquiesced in the same by conduct. But, in the present case, there are no materials placed before the Court to this effect. I also find that such a specific plea was not taken and presented in the Courts below.

25. Coming to the question of wilful default, I find that the appellate authority has again acted on a misconception. Admittedly under Exhibit A-8, the lease agreement the rate of rent stipulated was Rs. 28.50 after 2nd August, 1972. Inspite of the same, the 1st respondent would contend that he would pay only at the rate of Rs. 15 p.m. and the 1st respondent having had been a party to the written agreement, cannot be said to have acted *bona fide* under a wrong notion. On an analysis of the materials, I find that the finding of the Rent Controller that the 1st respondent committed wilful default, is correct. The appellate authority diverted his attention more on the conduct of the petitioner in making the demands at the earliest point of time after the assignment in her favour. This is not proper. The question to be considered is, whether the default committed by the tenant is wilful or not. As stated above, the tenant inspite of Exhibit A-8 would maintain that he would pay only at the rate of Rs. 15 p.m. and persisted in the said stand in the Courts below and even at the said rate, the tenant showed no alacrity to deposit the rents, as enjoined by the statute. This would come within the mischief 'wilful default' as defined under the provisions of the Tamil Nadu Act XVIII of 1960. In this view also, the petition for eviction filed by the petitioner should be allowed.

26. In the said circumstances, this revision is allowed. The order of the appellate authority is set aside and the order of the Rent Controller is restored. Taking into consideration the facts and circumstances of the case and the relationship between the parties, I consider sufficient time should be given for the respondent to vacate. The respondents will have *four* months to vacate. No orders as to costs.

R.S. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*A. Varadarajan, J.*

The Madras State Wakf Board by its Secretary .. *Appellant**

v.

Vellayan Chettiar and others .. *Respondents.*

(*A*) *Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (Madras Act XXX of* 1963)—*Object and scope of.*

(*B*) *Waqf Act (XXIX of* 1954)—*Minor Inam—Suit for possession of properties or foot of properties being waqf properties—Jurisdiction of Civil Court to entertain the suits.*

In the present case the suits were for the possession of the properties with past and future mesne profits. These reliefs could not be granted by the Authorities constituted under Act XXX of 1963 and could be granted only by the Civil Court. No doubt, when the question of title to the properties is sought to be raised in the present suit for possession it is open to the defendant-respondent to contend that the question cannot be gone into by the Civil Court having regard to the special provisions contained in Act XXX of 1963 and that the Waqf Board is not entitled to recover possession of the properties not having obtained patta for the same under the provisions of the Act, but that does not mean that the Civil Court has no jurisdiction to go into the question whether it is or is not open to the appellant to seek to recover possession of the properties. Therefore it is not possible to

*S. A. No. 172 and etc. of 1974. 27th October, 1977.

hold that the Civil Court has no jurisdiction to entertain the suits. [*Para.* 18].

Cases referred to:—

Adakalathammal v. *Chinnayan Panipunder*, (1959) 1 M.L.J. 314 : 72 L.W. 358: A.I.R. 1959 Mad. 447; *Krishnaswami Thevar* v. *Perumal Konar*, (1961) 1 M.L.J. 169; *Gopalan* v. *State of Madras*, (1958) 2 M.L.J. 117 : 71 L.W. 672 : I.L.R. (1958) Mad. 798 : A.I.R. 1958 Mad. 539; *Rajagopalachariar* v. *State of Madras*, (1959) 2 M.L.J. 344 : 72 L.W. 536: I.L.R. (1959) Mad. 1073 : A.I.R. 1960 Mad. 543; *C. V. Subbayya* v. *P. Anjayya*, (1974) 1 M.L.J. 58 (S.C.) : (1974) 1 S.C.J. 130 : (1974) 1 An.W.R. (S.C.) 58 : (1972) 3 S.C.R. 172 : A.I.R. 1972 S.C. 1421; *Someswaraswamy Varu* v. *Srirajitam*, (1971) An.W.R. 14.

Appeals against the decrees of the Court of the Subordinate Judge, Madurai in A.S. Nos. 191 of 1970 and etc. respectively.

M. A. Sathar Sayeed, S. I. Samiullah and *S. M. Hameed Mohideen*, for Appellant.

T. K. Rajagopal and *G. Viswanathan*, for Respondents.

The Court delivered the following

JUDGMENT.—The Madras State Wakf Board represented by its Secretary, the plaintiff in the 38 suits filed before the District Munsif, Tirumangalam for recovery of possession of the suit properties with past and future mesne profits who failed in both the Courts below on the question of the Civil Court's jurisdiction to entertain the suits is the appellant in these second appeals. The properties involved in O.S. No. 232 of 1968 out of which S.A. No. 271 of 1974 has arisen are situate in Ponmeni Village, Madurai Taluk. The properties involved in the other suits out of which the other appeals arise are situate in certain other villages in Nilakottai Taluk. The properties in the suits were admittedly minor inams which were abolished by the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act XXX of 1963) with effect from 15th February, 1965. The Wakf Act (XXIX of 1954), was passed by the Parliament to provide for the better administration and supervision of wakfs in the whole of India except the State of Jammu and Kashmir. There is no dispute that this Act has come into force in this State on 15th January, 1955. Section 4 (1) of that Act provides for the State Government by notification in the Official Gazette appointing a Commissioner of Wakfs and as many Additional or Assistant Commissioners as may be necessary for making a survey of the wakf properties existing in the State at the date of commencement of the Act. Under sub-section (3) of section 4 the Commissioner has power, after making such enquiry as may be considered necessary, to submit his report to the State Government containing the particulars mentioned in clause (a) thereof. Under section 5 (1) of the Act, on receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy thereof to the Board of Wakfs, establishment under sub-section (1) or sub-section (1-A) of section 9. Under section 5 (2) the Board shall examine the report and publish in the Official Gazette a list of wakfs containing such particulars as may be prescribed. The publication in these cases was made on 27th May, 1959. Under section 6 (1), if any question arises whether a particular property specified as wakf property in a list of wakfs published is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the Mutawalli of the wakf or any person interested therein may institute a suit in a Civil Court of competent jurisdiction for the decision of the question and the decision of the Civil Court in respect of such matter shall be final. According to the Proviso to section 6 (1) no such suit shall be entertained by the Civil Court after the expiry of one year from the date of the publication of the list of wakfs.

2. On the basis of the aforesaid notification dated 27th May, 1959, the suits for possession were filed by the appellant in these appeals. As already stated, the Inam was notified under

Act XXX of 1963 on 15th February, 1965.

3. The defence was that the Notification was not binding on the respondents, that the suit properties were minor inam properties governed by Act XXX of 1963 and that no civil suit lies in view of the Notification of the inam under that Act. An issue relating to jurisdiction was framed in all the suits and it reads thus:

"Whether the Court of the District Munsif, Tirumangalam has no jurisdiction to entertain the suits?"

4. It was contended before the learned District Munsif that the Civil Court is impliedly barred to try the question, namely, the nature and character of the properties involved in the suits and that this question will be a primary question to be decided as between the parties to the suits. The learned District Munsif has observed that there is considerable force in this submission and he has held that the suits have been filed only to circumvent the provisions of the Act and nothing more and that under such circumstances, the Civil Court has no jurisdiction to entertain the suits. After recording such a finding, the learned District Munsif dismissed all the suits and directed the parties to bear their respective costs.

5. The learned Subordinate Judge of Madurai has extracted in paragraph 3 of his common judgment in all the appeals before him the several pleas raised by the respondents and has stated that at the instance of the parties in all the suits, the preliminary issue as to whether the Court of the District Munsif, Tirumangalam has no jurisdiction to try the suits was taken up for consideration. He agreed with the District Munsif and dismissed the appeals with costs.

6. The learned District Munsif was wrong when he accepted the submission that the question involved in the suits was about the nature and character of the properties involved. But the learned Subordinate Judge rightly understood the scope of the suits and has stated in paragraph 5 of his judgment that the suits have been filed for recovery of possession of the properties on the basis that they have been endowed as inams for religious and charitable purposes and that the respondents are in wrongful possession and enjoyment of the properties. The contention urged on behalf of the appellant before the learned Subordinate Judge was that the reliefs of recovery of possession and mesne profits can only be granted by the Civil Court and that the officers appointed under Act XXX of 1963 are incompetent to grant such reliefs and, therefore, the suits for recovery of possession and mesne profits can only be entertained and decided by a Civil Court and a Civil Court alone would consequently have jurisdiction to try the suits. But the learned Subordinate Judge rejected this conclusion and dismissed the appeals with costs as stated above observing:

"Considering the nature and character of the present suits and the scope of the Civil Court with reference to the provisions of Act XXX of 1963 and the various decisions cited for and against the point, whether the Civil Court has jurisdiction to try the suits in question, I hold that the present suits under appeal have been filed in the Court of the District Munsif, Thirumangalam only with a view to evade the provisions of Act XXX of 1963 with regard to the determination of the question as to who was entitled to get patta for the suit lands......"

7. In view of section 3 (*b*) of Act XXX of 1963, it cannot be disputed that all rights in the inam has vested in the Government though an attempt was made by the learned counsel for the appellant to contend that the title to the lands had not vested in the Government by the Notification of the village under the provisions of the Act. Section 3 (*b*) of the Act lays down that every minor inam including all communal lands and porambokes, waste lands, pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks and oranies, fisheries and ferries, situa-

ted within the boundaries thereof, shall stand transferred to the Government and vest in them free of all encumbrances; and certain Acts including the Madras (Transferred Territory) Ryotwari Settlement Act, 1964, and all other enactments applicable to ryotwari lands with certain exceptions mentioned in the clause had been made applicable to the minor iram. Therefore there is no substance in the contention that title has not vested in the Government.

8. Section 7 of the Act provides for the Government constituting as many Tribunals as may be necessary for the purposes of the Act. Section 8 (1) of the Act lays down that subject to the provisions of sub-section (2) every person who was lawfully entitled to the kudivaram in an inam land immediately before the appointed day whether such person is an inamdar or not shall, with effect on and from the appointed day, be entitled to ryotwari patta in respect of that land. Section 8 (2) (*i*) (a) and (b) provide for grant of patta in respect of lands transferred by way of sale. Under section 8 (1) (*i*) (a) if the transferee or his heir, assignee, legal representative or person deriving rights through him had been in exclusive possession of the land for a continuous period of sixty years immediately before the 1st day of April, 1960, such person shall, with effect on and from the appointed day, be entitled to ryotwari patta in respect of that land. Under Clause (*b*) if the continuous possession was not for a period of sixty years immediately before the 1st day of April, 1960 but was for a continuous period of only twelve years before that date, such person shall, with effect on and from the appointed day, be entitled to a ryotwari patta if he pays as consideration to the Government in such manner and in such number of instalments as may be prescribed an amount equal to twenty times the difference between the fair rent in respect of such land determined in accordance with the provisions contained in the Schedule and the land revenue due on such land. Section 8 (4) of the Act provides for payment of the compensation thus payable under section 8 (2) (*i*) (b) to the institution concerned in one lump sum within such period and in such form and manner as may be prescribed. Section 9 of the Act provides for grant of patta in cases not governed by section 8. Section 10 deals with lands in respect of which no ryotwari patta will be granted. Section 11 deals with determination of lands in respect of which any person is entitled to ryotwari patta by the Assistant Settlement Officer after giving the necessary notices as required under that section. Against the decision of the Assistant Settlement Officer, there is provision for an appeal being filed to the Tribunal under section 11 (3) of the Act; and section 30 provides for appeal against the decision of the Tribunal under section 11 (3) to the special Appellate Tribunal consisting of two Judges of this Court nominated from time to time by the Chief Justice in this behalf. Section 46 (1) of the Act lays down that any order passed by any Officer, the Government or other authority or any decision of the Tribunal or the Special Appellate Tribunal under the Act in respect of matters to the determined for the purposes of the Act shall, subject only to any appeal or revision provided under the Act, be final. Under clause (2) of section 46 no such order or decision shall be liable to be questioned in any Court of law. Section 47 of the Act lays down that no suit or other proceeding shall lie against the Government for any act done or purporting to be done under the Act or any Rule made thereunder and also no suit, prosecution or other proceeding shall lie against any officer or servant of the Government for any act done or purporting to be done under the Act or any Rule made thereunder without the previous sanction of the Government. A period of limitation is provided for actions contemplated in section 47 (2) in clause (3) of that section. Section 43 (1) lays down that the decision of a Tribunal or the Special Appellate Tribunal in any proceeding under the Act on any matter falling within its jurisdiction shall be binding on the parties thereto and persons claiming under them in any suit or proceeding in a Civil Court, in so far as such matter is in issue between the parties or persons aforesaid in such suit or proceeding. Section 43 (2)

lays down that the decision of a civil Court (not being the Court of District Munsif or a Court of Small Causes) on any matter falling within its jurisdiction shall be binding on the parties thereto and persons claiming under them in any proceeding under the Act before a Tribunal or the Special Appellate Tribunal in so far as such matter is in issue between the parties or persons aforesaid in such proceeding.

9. In view of the special provisions in the Act whereunder an appeal could be filed against the order of the Assistant Settlement Officer granting patta under section 11 of the Act before a Tribunal and against the decision of the Tribunal in such matter before a Special Appellate Tribunal, it is not possible to agree with the learned counsel for the appellant that the Civil Court will have jurisdiction to go into the matter when there are rival claimants for the grant of patta. In this connection, the learned counsel for the appellant relied upon some decisions. The first of those decisious is that of a bench of this Court in *Adakalathammal* v. *Chinnayan Panipundar*[1] where the question was whether the jurisdiction of a civil Court in a suit for possession and other incidental reliefs based on title is ousted by section 56 (1) of the XXVI of 1948 which has since been omitted. There, the learned Judges observed thus :

> "The Settlement Officer is the autharity to examine the nature and history of all lands in respect of which the landholder claims a ryotwari patta under section 12, 13 or 14. Section 56 occurs among the miscellaneous provisions of the Act. Though in terms section 56 confers on the Settlement Officer the power to decide a dispute as to who the lawful ryot of any holding is, there is no corresponding provision expressly taking away the jurisdiction of the Civil Court. Section 65 no doubt bars the jurisdiction of Courts in certain cases; but that is more in the nature of an immunity section."

Having regard to the material provisions of the Act and having regard to the express language of such provisions and without referring to any decided authority we are of opinion that clause (c) in section 56, sub-section (1) of the Act refers only to a dispute as to rights under the Act, that is, the right to obtain a ryotwari patta. The decision of the Settlement Officer would be necessary in case of a dispute to work out the right conferred under section 11 on every ryot in an estate to obtain a ryotwari patta in respect of ryoti lands which were included or ought to have been included in his holding. The proviso to section 3 (*d*) which has been quoted earlier in this judgment prevents Government from dispossessing any person of any lands in an estate in respect of which they consider that he is *prima facie* entitled to a ryotwari patta, if such a person is a ryot pending the decision of the Settlement Officer as to whether he is actually entitled to such a patta. It follows, therefore, that if a person has been in possession of ryoti land and another person has trespassed on his holding and no ryotwari patta has actually been granted to either of the persons, there is nothing *prima facie* in any of the provisions of the Act which prevents a civil Court from entertaining a suit for possession by a person who had been in possession and who had been dispossessed. Such a dispute would not necessarily mean that the successful party would be eventually entitled to a patta. To give one instance, if the person in possession was a sub-tenant from a ryot for a fixed period and during that period he had been dispossessed by another, the sub-tenant could maintain a suit for possession and

1. (1959) 1 M.L.J. 314; 72 L.W. 358: A.I.R. 1959 Mad. 447.

even obtain posessions; but eventually the patta may be granted only to the ryot in respect of the holding and not to the sub-tenant who might have succeeded in his suit for possession against the trespasser. Clause (c) in section 56 (1) should be read along with other provisions of the Act and the rights and privileges which can be recognised and conferred by or under the Act. So understood there is no conflict between the jurisdiction of a Settlement Officer and the jurisdiction of Civil Court. The suits out of which the above appeals arise were all suits simpliciter for recovery of possession on the ground that the plaintiff is entitled to the concerned land and that the defendant or defendants are trespassers. Section 56 (1) cannot by implication take away the jurisdiction of the civil Court to try such suits.

10. The next decision relied upon by the learned counsel for the appellant is that of Ramachandra Iyer, J., as he then was in *Krishnaswami Thevar* v. *Perumal Konar*[1]. There, the learned Judge has observed:

"What the Act intended to do was to effect a conversion of the erstwhile Zamindari and Inam estates into ryotwari system of tenure. The features of ryotwari system are too well known to require recapitulation. Recently, I had occasion to consider the features of that system in two cases, *viz.*, *Gopalan* v. *State of Madras*[2], and *Rajagopalachariar* v. *State of Madras*[3]. Shortly stated, the ryotwari system was conceived as a system of land revenue administration without the aid of middleman, a ryotwari pattadar is treated as the proprietor, he being made to pay the assessment directly to the Government. The assessments are fixed periodically. There has been some controversy as to whether such assessments should be held to partake the character of a rent or were really in the nature of a tax. The preponderance of authority is now in favour of the view that the assessments are in the nature of taxes. The effect of sections 11 to 14 is to declare that the ryots in the quandom estate as well as the Zamindar or Inamdar as the case may be would be respectively entitled to patta in respect of the kudivaram or pannai lands. Section 11 read with section 3 (d), Proviso 1 would show that the ryotwari patta in respect of ryoti lands would be granted to the ryot by the Settlement Officer. There is no provision in section 11 for the ascertainment of even the character of the land. Nor is there any machinery to decide whenever a dispute arises between the rival claimants for the patta. Section 15 however provides for the examination of the nature and history of the private or pannai land in respect of which the landholder would be entitled to a ryotwari patta under the provisions of sections 12 to 14. There is also a provision for appeal and for the finality of the decision in the appeal in respect of that matter. It may be noticed that under section 15 it is only the nature and character of the land that has got to be decided by the special machinery created by the Act. Patta would be given to the landholder if the land is of the category mentioned in sections 12 to 14. But if there are rival claims to the title of the landholder himself there would be no power in the Settlement Officer or the Tribunal to adjudicate as to who among them

1. (1961) 1 M.L.J. 169.
2. (1958) 2 M.L.J. 117 : 71 L.W. 672 : I.L.R. (1958) Mad. 798 : A.I.R. 1958 Mad. 539.
3. (1959) 2 M.L.J. 344 : 72 L.W. 536 : I.L.R. (1959) Mad. 1073 : A.I.R. 1960 Mad. 543.

would have a preferential right. This is more so in a case under section 11 where no question of any decision at all can arise. There is no provision for any adjudication amongst the rival claimants to patta in respect of a particular land. It would therefore follow that the statute having declared that the erstwhile ryot (that is the ryot lawfully entitled to be in possession of the holding) would be entitled to patta and not having designated a Tribunal or machinery to decide as to who amongst the several claimants would be entitled to patta, the dispute if and when it arises will have necessarily to be decided by the Civil Court."

11. In that suit also, the prayer was for declaration of title and for recovery of possession of the property from the defendant.

12. Reliance was also placed by the learned counsel for the appellant on the decision of the Supreme Court in *C.V. Subbayya* v. *P. Anjayya*[1], and of Ramanujam, J., in *Subbiah Pillai* v. *Veerabadran and another*[2]. The learned counsel further relied upon the decision of Sethuraman, J., in *Jumma Mosque, Salavakkam, represented by its Jamatha of Salavakkam Village by its members and others* v. *Sulaiman Sheriff and another*[3]. The decision of the Supreme Court and that of Ramanujam, J., were concerned with communal lands governed by Act XXVI of 1948. Therefore, all the four decisions, namely *Adakalathammal* v. *Chinnayan Panipundar*[4], *Krishnaswami Thevar* v. *Perumal Konar*[5], *L. V. Subbayya* v. *P. Anjayya*[1] and *Subbiah Pillai* v. *Veerabadran and another*[2] arose out of decisions relating to lands governed by Act XXVI of 1948. They are not relevant for the purpose of the present cases which are governed by Act XXX of 1963. As observed by Ramachandra Iyer, J., as he then was, in *Krishnaswami Thevar* v. *Perumal Konar*[1], in cases governed by section 11 of Act XXVI of 1948 there is no provision for any adjudication amongst the rival claimants to patta in respect of a particular land.

13. Section 11 of Act XXVI of 1948 merely lays down that every ryot in an estate shall, with effect on and from the notified date, be entitled to a ryotwari patta in respect of all lands mentioned in clauses (*a*) and (*b*) subject to the proviso. The enquiry by the Settlement Officer under section 15 (1) of that Act has been confined only to lands to which sections 12, 13 and 14 of the Act are applicable. Section 12 deals with lands in Zamindari estate in which the landholder is entitled to ryotwari patta. Section 13 deals with lands in inam estate in which the landholder in entitled to ryotwari patta, and section 14 deals with grant of patta to the landholder in respect of lands in an under tenure estate. Since no machinery has been provided for the grant of ryotwari patta under section 11 of the Act, certainly the Civil Court will have jurisdiction when there are rival claims for the grant of patta under that section before the patta had been granted by the authorities under the Act.

14. The suit, out of which S.A. No. 1705 of 1976 decided by Sethuraman, J., arose, was for declaration and injunction in respect of certain lands which had been notified under Act XXX of 1963 as from 15th February, 1965. The contention in that suit also was that the civil

1. (1974) II M.L.J. (S.C.) 58: (1974) 1 S.C.J. 130 : (1974) 1 An.W.R. (S.C.) 58 : (1972) 3 S.C.R. 172 ; A.I.R. 1972 S.C. 1421.
2. S.A. No. 1090 of 1976.
3. S.A. No. 1705 of 1976.
4. (1959) 1 M.L.J. 314 : 72 L.W. 358.
5. (1961) 1 M.L.J. 169.

1. (1961) 1 M.L.J. 169.

Court had no jurisdiction. Sethuraman, J., held that that contention was not tenable. The learned Judge has observed in his judgment thus:

"Section 43 provides that the decision of a Tribunal in any proceeding under the Act on any matter falling within its jurisdiction is binding on the parties and persons claiming under them, in any suit or proceeding in a Civil Court, in so far as such matter is in issue between the parties in such suit or proceedings. The binding nature is restricted to any matter falling within the jurisdiction of the Tribunal or the Appellate Tribunal. In the present case the decision which is relied on by the respondents as constituting the bar to the present proceedings is the one decided by the Tribunal exercising jurisdiction under section 11 (3). Section 11, as already pointed out, provides for the grant of ryotwari patta and the Assistant Settlement Officer has to decide this question in respect of the land over which any claim is made. The jurisdiction of the Assistant Settlement Officer is merely for the purpose of granting a patta and not to decide any dispute as to title. It is his decision, which is the subject-matter of the appeal before the Tribunal and the jurisdiction of the Tribunal is also restricted to finding out the person in whose favour the ryotwari patta is to be issued. As the Tribunal has no jurisdiction to go into the question of title to the land, as such I do not consider that the bar enacted in section 43 operates in the present case so as to disentitle the plaintiffs from filing the present suit."

15. With respect, I am unable to agree with the learned Judge that the jurisdiction of the Assistant Settlement Officer under section 11 is merely for the purpose of granting a patta and not to decide any dispute as to title, for the title to the land vests in the Government with effect on and from the appointed day by virtue of the notification under section 3 (*b*) of the Act and by the grant of patta under the provisions of the Act, the rights of the person to whom patta was granted to be in possession of the land is recognised by the Government. I may mention in this connection that Ramachandra Iyer, J. as he then was has observed in his judgment in *Krishnaswami Thevar* v. *Perumal Konar*[1] referred to above that "a ryotwari pattadar is treated as the proprietor he being made to be pay the assessment directly to the Government."

16. Mr. G. Viswanatha Iyer, the learned counsel for the respondents in S.A. Nos. 270 and 280 of 1974 invited my attention to a decision of a Bench of the Andhra Pradesh High Court in *Someswaraswamy Varu* v. *Srirajitam*[2] where the learned Judges have observed at pages 17 and 18 thus:

"The suit in the present case is for possession of items 3 to 10 of the plaint B schedule lands also along with mesne profits. But as stated already, the defendant's possession cannot be disturbed until their right to a patta is adjudicated on by the Settlement Officer, a Tribunal contemplated under the Act. This dispute is not a question relating to who has the lawful title to the land as title vested only in the Government but as to who is lawfully entitled to a patta. The question relating to the granting of patta as between the landlord and the tenant, also is a question to be decided by the Settlement Officer, under sections 11 and 12 of the Act. It is not open to the plaintiff to circumvent the Act and go to a civil Court and ask for possession when the

1. (1961) 1 M.L.J. 169.
2. (1971) 1 An.W.R. 14.

civil Court cannot grant possession unless it goes into the question as to who is entitled to a patta and this is exclusively within the jurisdiction of the Settlement Officer under the Act.'

17. The decision also was rendered by the learned Judges under the provisions of Act XXVI of 1948 and would not, therefore, apply to the facts of the present cases which are governed by Act XXX of 1963 which contains provisions for appeal to the Tribunal and Special Appellate Tribunal in matters decided by the Assistant Settlement Officer under section 11 of the Act and those decisions are final and could not be questioned in any Court of law in view of section 46 of the Act.

18. The present suits, as already stated, are for possession of the properties with past and future mesne profits. These reliefs could not be granted by the authorities constituted under Act XXX of 1963 and could be granted only by the Civil Court. No doubt, when the question of title to the properties is sought to be raised in the present suits for possession, it is open to the respondents to contend that this question cannot be gone into by the civil Court having regard to the special provisions contained in Act XXX of 1963 and that the appellant is not entitled to recover possession of the properties not having obtained patta for the same under the provisions of the Act, but that does not mean that the Civil Court has no jurisdiction to go into the question whether it is or is not open to the appellant to seek to recover possession of the properties. Therefore, it is not possible to agree with the view of the Courts below that the Civil Court has no jurisdiction to entertain the suits.

19. The second appeals are accordingly allowed, but under the circumstances of the case, without costs. The suits are restored to the file of the learned District Munsif of Tirumangalam and he shall dispose of them according to law after considering the evidence which the parties may adduce and any arguments that may be advanced in respect of the several contentions and the relevant provisions in Act XXX of 1963. The District Munsif shall dispose of the suits which are of the year, 1968 expeditiously.

R.S. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*P. Govindan Nair, C.J. and A. Varadarajan, J.*

S. Subramanian .. *Appellant**

v.

V. Vellaikannu and others .. *Respondents.*

(A) *Tamil Nadu Panchayat Act (XXXV of 1958), section 149-A—Scope and applicability—Petitioner, President of Panchayat—Ten charges framed against him regarding serious irregularities—Show cause notice given—Explanation submitted—Meeting of Panchayat—Majority of members voted against removal of President from office—All charges however except one held by Inspector proved and petitioner was removed from office—No reasons given for conclusions—Order of removal liable to be quashed.*

(B) *Constitution of India,* (1950) *Article* 226.

Held, that in the light of the decisions of the High Courts and the Supreme Court what is done by the Inspector of Panchayats under section 149-A (11) of the Tamil Nadu Panchayat Act to the prejudice of the President without accepting the view of the Panchayat

*W.A. No. 312 of 1977 and W.P. No. 1685 of 1977. 23rd *December*, 1977.

expressed in favour of the President is a quasi-judicial act for which reasons have necessarily to be given and that even if it is administrative in character, reasons must have been given by the Inspector for coming to the conclusion that the petitioner was guilty of 9 out of 10 charges, as had been held by the first respondent, so that the petitioner may know for what reasons or on what grounds his explanation had been rejected and he had been found guilty of the the nine charges. Since no reason is found in the impugned orders and no material could be placed before the Court, the High Court is entitled to interfere under Article 226 if the Constitution and set aside the orders. [Para. 20.]

Cases referred to :—

S.D.G. Pandara Sannidhi v. *State of Madras*, (1965) 2 S.C.J. 711 : (1965) 2 An.W.R. (S.C.) 167 : (1965) 2 M.L.J. (S.C.) 167 : (1965) 3 S.C.R. 17 : A.I.R. 1965 S.C. 1578; *Guruswamy* v. *Collector and Inspector of Panchayat*, (1977) 2 M.L.J. 326; *Swadeshi Cotton Mills Co. Ltd.* v. *State Industrial Tribunal*, (1962) 1 S.C.R. 422: A.I.R. 1961 S.C. 1381 ; *Bhagat Ram* v. *State of Punjab*, (1973) 1 S.C.R. 92: A.I.R. 1972 S.C. 1571; *State* v. *Bhagat Ram*, A.I.R. 1970 P. & H. 9; *Rajiah* v. *Inspector of Municipal Councils and Local Boards*, (1955) 2 M.L.J. 116: 68 L.W. 419 : A.I.R. 1955 Mad. 584; *Denly* (*William*) *and Sons Ltd.* v. *Minister of Health*, L.R. (1936) 1 K.B. 337; *Radhe Shyam* v. *State of Madhya Pradesh*, 1959 S.C.J. 6 : (1959) S.C.R. 144: (1959) 1 An.W.R. (S.C.) 5 : (1959) 1 M.L.J. (S.C.) 5 : A.I.R. 1959 S.C. 107; *Province of Bombay* v. *Khasaldas S. Advani*, 1950 S.C.J. 451 : 1950 2 M.L.J. 703 : 1950 S.C.R. 621 : A.I.R. 1950 S.C. 222; *State of Madras* v. *Tirunelveli Municipal Council*, (1967) 1 M.L.J. 47; *Mahabir Prasad* v. *State of U.P.*, (1971) 1 S.C.J. 256: (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302; *Associated Cement Companies Ltd.* v. *P. M. Sharma*, (1966) 1 S.C.J. 786 : (1965) 2 S.C.R. 366: A.I.R. 1965 S.C. 1595 ; *Ridge* v. *Baidwin*, (1964) A.C. 40; *Mayer Simon* v. *Advocate-General*, A.I.R. 1975 Ker. 57; *Breen* v. *Amalgamated Engineering Union*, (1971) 1 All E.R. 1148; *Nakkuda Ali's case*, In re, (1951) A.C. 66; *State of Orissa* v. *Binapani Dei*, (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 625: A.I.R. 1967 S.C. 1269; *Union of India* v. *Anglo Afghan Agencies*, (1968) 2 S.C.J. 889 : (1968) 2 S.C.R. 366 : A.I.R. 1968 S.C. 718; *A. K. Kraipak* v. *Union of India*, (1970) 1 S.C.J. 381 : (1970) 1 S.C.R. 457 : A.I.R. 1970 S.C. 150; *D.F.O. South Kheri* v. *Ram Sanehi Singh*, (1971) 3 S.C.C. 864 : A.I.R. 1973 S.C. 205; *Kesara Mills Co. Ltd.* v. *Union of India*, (1973) 3 S.C.R. 22 : (1973) 1 S.C.C. 380; A.I.R. 1973 S.C. 389 ; *Cooper* v. *Wandsworth Board of Works*, (1863) 14 C.B.N.S. 180; *Kochunni Nayar* v. *Dist. Collector, Alleppy*, (1957) Ker.L.J. 1041; *Sharp* v. *Wakefield*, (1891) A.C. 172.

W. A. No. 312 *of* 1977:

Appeal under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Ramanujam, dated 4th October, 1977 and made in the Exercise of the Special Original Jurisdiction of the High Court of Writ Misc. Petitions Nos. 4984 and 4985 of 1977 in W.P. No. 1685 of 1977—W.M.P. No. 4984 of 1977—Petition presented to vacate the interim stay granted in and by the orders of this Court dated 29th June, 1977 and made in W.M.P. No. 2554 of 1977—Petition presented to stay the order passed by the Collector of Ramanathapuram in his proceedings No. N.K.V. 19/209311/76, dated 8th April, 1977, as confirmed by the order of the second respondent in his proceedings No. G.O.Rt. 1371, dated 31st

May, 1977 pending W.P. No. 1685/77 —W.M.P. No. 4985/77—Petition presented to implead the petitioner therein as the third respondent in W.P. No. 1685 of 1977.

W.P.No. 1685 of 1977:

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the order of the first respondent in his N.K.V. 19/209311/76, dated 8th April, 1977 and as confirmed by the order of the second respondent dated 31st May, 1977 made in his proceedings G.O.Rt.No. 1371, dated 31st May, 1977 and to quash the order removing the petitioner from the Presidentship of the Panchayat at Aralikottai.

K. K. Venugopal, for *T. S. Subramanian*, for Appellant.

R. Mohan, for first Respondent.

The Government Pleader, for Respondents 2 and 3.

The Judgment of the Court was delivered by

Varadarajan, J.—The writ petition has been filed for the issue of a writ of *certiorari* or any other appropriate writ or order quashing the first respondent's order dated 8th April, 1977 made in NKV. 19/209311/76 removing the petitioner from Presidentship of Aralikottai Panchayat, as confirmed by the second respondent's order in G.O. Rt. No. 1371, Rural Development and Local Administration Department, dated 31st May, 1977. The writ appeal has been filed against the order dated 4th October, 1977 of Ramanujan, J., dismissing W.M.P. No. 4985 of 1977, which had been filed by the appellant, a third party, for being impleaded as a party to the writ petition on the ground that he had been asked to take charge from the writ petitioner (hereinafter referred to as the petitioner) as the President of the Aralikottai Panchayat as a stop-gap arrangement. The appellant claimed to have taken charge as the President of the Panchayat on 9th June, 1977. Ramanujam, J., dismissed the Writ Miscellaneous Petition on the ground that the appellant had no interest in the subject-matter of the writ petition upholding the objections of the petitioner that the appellant is not a necessary party and that his presence is not required to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the writ petition. The petitioner contended in his counter-affidavit filed in the Writ Miscellaneous Petition that he had been legally continuing to discharge his duties as President of the Panchayat till the date of his counter-affidavit, namely, 3rd October, 1977.

2. On a complaint of one K. R. Sevugaperumal, a member of the Aralikottai Panchayat presented to the first respondent, Collector of Ramanathapuram, on 21st September, 1976 alleging that the petitioner Vellaikannu had committed certain irregularities in the administration of the Panchayat, the Divisional Development Officer, Devakottai directed the petitioner, by an order dated 17th November, 1976, to produce all the registers of the Panchayat before him on 23rd November, 1976. The first respondent framed 10 charges against the petitioner and called upon him, by a notice dated 8th January, 1971, to show cause within 15 days of receipt of the notice, as to why he should not be removed from the Presidentship of the Panchayat under section 149-A (1) (*c*) of the Tamil Nadu Panchayats

Act (XXXV of 1958) (hereinafter referred to as the Act) in view of those charges. The petitioner was given further time up to 7th February, 1977 to submit his explanation and he was permitted to inspect the records of the Panchayat in the presence of the Divisional Development Officer, Devakottai. The explanation of the petitioner was submitted with a request that it may be accepted and the charges against him dropped. The first respondent caused the charges to be placed before the Panchayat at a metting held on 9th March, 1977 presided over by the Tahsildar of Tirupattur, and attended by seven members of the Panchayat including the petitioner. In that meeting, five members voted against the first respondent's proposed action to remove the petitioner from the Presidentship of the Panchayat, one member Mookkan stated that he does not know anything about charges 2, 8 and 9 and the other members K. R. Sevugaperumal, who presented the petition before the first respondent on 22nd September, 1976 as stated earlier, alone voted in favour of the proposed action. However, the first respondent stated in his impugned order dated 8th April, 1977 that the petitioner's explanation was not satisfactory and unacceptable, that all the charges except Charge No. 8 were proved, that they all related to serious irregularities and that in the interest of the proper administration of the affairs of the Panchayat, he was not accepting the views of the Panchayat as expressed in the meeting held on 9th March, 1977 and had decided to remove the petitioner from the Presidentship of the Panchayat under section 149-A (11) of the Act. He, therefore, ordered the removal of the petitioner from the office with effect from 1st May, 1977. The petitioner filed a revision petition before the second respondent, the Government of Tamil Nadu, against the first respondent's order. The second respondent rejected that petition by an order dated 31st May, 1977 saying that they examined the revision petition with reference to the connected records and that there is no case for interference with the order of the first respondent. It is further stated in that order that under section 149-A (11) of the Act the Collector, as Inspector, may, after considering the views of the Panchayat, in his discretion, either remove the President from office by notification with effect from a date to be specified therein or drop further action and that the first respondent has reported that the views of the Panchayat and the explanation of the petitioner were duly considered by him and found to be unsatisfactory.

3. The petitioner's case is that all the charges were baseless and he had stated in the explanation to the charges that he had the necessary records and vouchers in his possession and in the concerned office of the Divisional Development Officer and Revenue Divisional Officer. The further contention of the petitioner is that the first respondent had no jurisdiction to overrule the views of the Panchayat and remove him from the office and that he had overruled the view of the Panchayat without assigning any reason for doing so and had not exercised his discretion judiciously. The petitioner stated that the first respondent had not called upon him to produce the records to prove his contention in the explanation submitted by him and acted arbitrarily and with partiality without giving him a proper hearing, at the instigation of the member K. R. Sevugaperumal, who belongs to a different political party and whose brother-in-law was the person who opposed the petitioner in the election for the Presidentship of the Panchayat. So far as the second respondent is con-

cerned, the case of the petitioner is that the second respondent has not properly appreciated all the facts and circumstances and has passed the order dated 31st May, 1977 in a perfunctory and summary manner.

4. In the counter affidavit the second respondent admits that the majority of the members of the Panchayat presided over by the Tahsildar resolved to permit the petitioner to continue as President of the Panchayat and contends that as the views of the Panchayat duly considered by the first respondent were found to be not satisfactory, the first respondent removed the petitioner from Presidentship in his order dated 8th April, 1977 in exercise of the powers vested in him under section 149-A (11) of the Act. The second respondent further denies that the charges framed against the petitioner were baseless and contends that all the accounts and books were properly scrutinised and verified and they established the guilt of the petitioner. According to the second respondent, the first respondent has properly exercised his discretion vested in him and in any event his order is not a quasi judicial order and it can be issued by a mere notification. The second respondent further contends that the petitioner was given proper hearing and the charges were proved beyond doubt and that the second respondent has passed the order dated 31st May, 1977 only after fully examining the entire records.

5. In the additional grounds filed in the writ petition it is stated that section 149-A (11) conferring an unguided power on the Collector to pick and choose the President if he does not like, is *ultra vires* Article 14 of the Constitution of India and that is also liable to be struck down on the ground that it does not lay down in clear terms the guidelines to be followed by the Collector in exercising his judicial discretion when he differs from the views of the majority of the members of the Panchayat against the removal of the President, and is also violative of Article 19 of the Constitution in that it places unreasonable restrictions on the rights guaranteed by that Article.

6. The additional grounds, which have not been urged before any of the respondents and have been put forward only in the writ petition at a later stage, could be considered by the Court in view of the decision is *S. D. G. Pandara Sannidhi* v. *State of Madras*[1].

7. The contention of the second respondent that all the charges framed against the petitioner have been proved is not in consonance with the first respondent's impugned order dated 8th April, 1977, where it is stated that the eighth charge relating to the petitioner incurring an expenditure of Rs. 4,322 under the shramdan or man power scheme and misusing his powers, even though there was no such separate road as Aralikottai—Ammachi Road, is not proved.

8. "Inspector", according to section 2 (15) of the Act means any officer who is appointed by the Government to exercise or perform any of the powers or duties of the Inspector under the Act. There is no dispute that the Collector of Ramanathapuram District, the first respondent, is the Inspector in the present case. Section 149-A (1) lays down that "the Inspector of his own motion or on a representation in writing signed by not less than two-thirds of the sanctioned strength of the Panchayat containing a statement of charges against the President and presented in person to the Inspector by any two of the members of the Panchayat, if satisfied that the President wilfully omits or refuses to carry out or disobeys any provision of the Act, or any rule, by law, regulation, or lawful order made or issued under the Act or abuses any power vested in him, shall, by notice in writing, require the President to offer, within a specified date, his explanation with respect to his acts of omission or commission mentioned in the notice". Under sub-section (2), if his explanation is received within the specified date and the Inspector considers that the explanation is satisfactory, he may drop further action with respect to the notice, and if no

1. (1965) 2 S.C.J. 711 : (1965) 2 An.W.R. (S.C.) 167: (1965) 2 M.L.J. (S.C.) 167: (1965) 3 S.C.R. 17 : A.I.R. 1965 S.C. 1578.

explanation is received within the specified date or if the explanation received is in his opinion not satisfactory, he shall forward to the Tahsildar of the taluk a copy of the notice referred to in sub-section (1) and the explanation of the President, if received within the specified date with a proposal for the removal of the President, for ascertaining the views of the Panchayat. Then the Tahsildar has, under sub-section (3), to convene a meeting for the consideration of the notice and the explanation, if any, and the proposal for the removal of the President, at the office of the Panchayat at a time appointed by him. After delivering a copy of the notice to the President and to all the members of the Panchayat at least seven days before the date of the meeting as required by sub-section (4), the Tahsildar shall preside at the meeting convened under sub-section (5). Under sub-section (8), as soon as the meeting convened is commenced, the Tahsildar shall read to the Panchayat the notice and the explanation and he is not entitled to vote. The views of the Panchayat have to be duly recorded in the minutes of the meeting as per sub-section (10) and a copy of the minutes has to be forthwith forwarded by the Tahsildar to the Inspector. Under sub-section (11), the Inspector may, after considering the views of the Panchayat in this regard, in his discretion either remove the President from office by notification with effect from a date to be specified therein or drop further action. The Government has been given power, under sub-section (12), to cancel any notification issued under sub-section (11) and may, pending a decision on such cancellation, postpone the date specified in such notification.

9. In the present case, the first respondent had issued the show cause notice dated 8th January, 1977 containing 10 charges and called upon the petitioner to explain why he should not be removed from the Presidentship of the Panchayat in view of those charges. The Revenue Divisional Officer had, by his proceedings dated 29th January, 1977, extended the time for the petitioner to peruse the records, from the office of the Divisional Development Officer and to submit his explanation for the memo. of charges till 7th February, 1977. The petitioner submitted his explanation to the first respondent denying all the charges and requesting that his explanation may be accepted and the charges dropped. In the meeting of the Panchayat held on 9th March, 1977, a majority of the members of the Panchayat who participated in that meeting expressed their view against the proposal of the first respondent to remove the petitioner from the office of President. The first respondent, however, declined to accept that view of the Panchayat. In his impugned order dated 8th April, 1977 he repeated all the 10 charges and stated what happened after the petitioner submitted his explanation and added that the view of the Panchayat and the belated explanation of the petitioner were examined, that the petitioner's explanation was neither satisfactory nor acceptable and all the charges except charge No. 8 were proved and they were all charges of serious irregularities and that in the interest of the proper administration of the Panchayat he had decided not to accept the view of the Panchayat but to remove the petitioner from the office of the President under section 149-A (11) of the Act and accordingly he has removed him from the office with effect from 1st May, 1977. It is not clear from the impugned order of the first respondent that he had taken any material into consideration after he had framed the charges, apart from considering the explanation offered by the petitioner and the view of the Panchayat as expressed in the meeting held on 9th March, 1977, for holding that all the charges, except Charge No. 8, have been proved. No other material could have been available for the second respondent who claims to have fully examined the entire records before rejecting the petitioner's revision petition.

10. The learned counsel for the petitioner submitted that the requirement of section 149-A (1) (*b*) of the Act has not been satisfied as the show cause notice had been issued by the first respondent on the complaint received from only one member of the Panchayat, namely, K.R. Sevugaperumal, while section 149-A (1) (*b*) lays down that the Inspector shall, on a

representation in writing signed by not less than two-thirds of the sanctioned strength of the Panchayat containing a statement of charges against the President and presented in person to the Inspector by any two of the members of the Panchayat, if satisfied that the President wilfully omits or refuses to carry out or disobeys any provision of the Act or any rule, bye-law, regulation, or lawful order made or issued under the Act or abuses any power vested in him, by notice in writing require the President to offer within a specified date, his explanation. It is, therefore, clear that the requirement of section 149-A (1) (*b*) is not satisfied. But the Inspector has the power to call upon the President to explain even on his own motion. Therefore, the first respondent's act in calling upon the petitioner to show cause may be traced to the power available to him under section 149-A (1) (*a*) of the Act. We are satisfied that there is no irregularity in this regard.

11. Mr. K. K. Venugopal, the learned counsel for the appellant in the Writ Appeal relied upon the decision of a Bench of this Court in *Guruswamy* v. *Collector and Inspector of Panchayat*[1], and contended that what has been done by the first respondent in exercise of the powers conferred by section 149-A (11) of the Act is an administrative act and that it is, therefore, not necessary for him to give any reasons in his order for his conclusion that all the charges except charge No. 8 are proved. In that case, the Panchayat, by a majority resolved to accept the Inspector's proposal to remove the President under section 149-A of the Act and this Court held that the rights and privileges of the President flow from the statutory provisions and he could not claim any right which was not secured to him under the enactment and that the exercise of the discretion under section 149-A could not be said to be judicial or quasi judicial and there was no justification for the President insisting that the Collector should give reasons for his accepting the views of the Panchayat. That was a case where the view of the Panchayat agreeing with the proposal of the Inspector to remove the President from his office was accepted by the Inspector unlike in the present case where the first respondent had chosen to differ from the majority of the Panchayat and come to the conclusion that the charges framed against the petitioner except Charge No. 8 were proved and that it was necessary in the interest of the proper administration of the Panchayat that the petitioner should be removed from his office under section 149-A of the Act. We will consider the question presently whether, in such a case, it is necessary for the Inspector to give his reasons for coming to the conclusion that the charges have been proved.

1. (1977) 2 M.L.J. 326.

12. Mr. Venugopal next relied upon the decision in *Swadeshi Cotton Mills Co., Ltd.* v. *State Industrial Tribunal*[1], where the Court was concerned with section 3 of the U.P. Industrial Disputes Act, which states:

> " If, in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order, make provision....
>
> * * * *
>
> (*c*) for appointing industrial Courts;
>
> (*d*) for referring any industrial dispute for conciliation or adjudication in the manner provided in the order
>
> * * * *
>
> (*g*) for any incidental or supplementary matters which appear to the State Government necessary or expedient for the purposes of the order."

The learned Judges of the Supreme Court observed in that judgment thus:—

> " The power to pass an order under section 3 arises as soon as the necessary opinion required thereunder is formed. This opinion is naturally formed before the order is made. If, therefore, such an opinion was formed and an order was passed thereafter, the subsequent order would be a valid exercise

1. (1962) 1 S.C.R. 422: A.I.R. 1961 S.C 1381.

of the power conferred by the section. The fact that in the notification which is made thereafter to publish the order, the formation of the opinion is not recited will not take away the power to make the order which had already arisen and led to the making of the order. The validity of the order therefore does not depend upon the recital of the formation of the opinion in the order but upon the actual formation of the opinion and the making of the order in consequence. It would therefore follow that if by inadvertance or otherwise the recital of the formation of the opinion is not mentioned in the preamble to the order the defect can be remedied by showing by other evidence in proceedings where challenge is made to the validity of the order, that in fact the order was made after such opinion had been formed and was thus a valid exercise of the power conferred by the law. The only exception to this course would be where the statute requires that there should be a recital in the order itself before it can be validly made."

There is an observation to the same effect in the decision in *Bhagat Ram* v. *State of Punjab*[1], which also was relied upon by Mr. Venugopal. In that case, an order removing a person from the membership of a committee had been passed by the State Government. A Full Bench of the Punjab and Haryana High Court in *State* v. *Bhagat Ram*[2], which came up for consideration before the Supreme Court, in their judgment held that the order of the State Government removing a municipal committee member was a quasi-judicial order and as such the State was bound to give its reasons for arriving at the decision. After a thorough examination of the note file provided by the State Government, the Full Bench held that the State had considered the explanation offered by the member and after applying its mind to the materials placed before it was justified in passing the order removing him from the membership of the committee and also disqualifying him for a period of three years. The learned Judges of the Supreme Court have observed:

"In the particular circumstances of the case, we are in agreement with the High Court that the file produced by the Government does disclose that the State has considered the appellant's representations as also the other relevant materials before it when passing the order dated 11th September, 1962."

These two decisions do not help the respondents, for, as already stated, there is nothing in the impugned order of the first respondent to show that any material, apart from the memo. of charges issued to the petitioner and the explanation offered by him, was looked into by the first respondent before the first respondent decided not to accept the view of the Panchayat and held that all the charges except Charge No. 8 framed against the petitioner were proved. No record such as any note file had been produced before the Court in the present case to show that there were materials disproving the petitioner's innocence and substantiating the charges levelled against him except Charge No. 8 for the Court to be satisfied that there were materials, though not set out in any of the impugned orders, from which it could be held that the guilt of the petitioner is proved.

13. The learned counsel for the petitioner invited our attention to a number of decisions and contended that even if the impugned order of the first respondent is an administrative order, reasons must have been given by the first respondent to come to the conclusion that the guilt of the petitioner in respect of the nine charges has been proved. We will deal with those decisions one by one. In *Rajiah* v. *Inspector of Municipal Councils and Local Boards*[1], the President of a Panchayat was removed from the office by the Inspector under the provisions of section 47 of the Madras Village Panchayats Act (X of 1950) which provided that the Inspector may, by notification, and with effect from a date to be specified therein, remove any President or Vice-President who, in his opinion, wilfully omits or refuses to carry out or disobeys the provi-

1. (1973) 1 S.C.R. 92 : A.I.R. 1972 S.C. 1571.
2. A.I.R. 1970 P. & H. 9.

1. (1955) 2 M.L.J. 116 : 68 L.W. 419: A.I.R. 1955 Mad. 584.

-sions of the Act or any rules, bye-laws, regulations or lawful orders issued therunder or abuses the powers vested in him. The President was given a show cause notice by the Inspector setting out seven items of misconduct. He sent his reply answering seriatim those charges. Subsequently, he was informed that the District Panchayat Officer would visit his office for the verification of the records in connection with the show cause notice already issued. The inspection took place. But the President was not informed of anything that had been noted against him. Subsequently he received an order from the Inspector saying that he had been removed from the office of President with effect from a particular date and a notification was published in the official gazette setting out that fact. The learned Judges of the Division Bench who heard the case held that the appellant before them has not had a reasonable opportunity of presenting his case and in fact there was no enquiry after the charges were framed, as in the present case, and it was a violation of section 47 (3) which stated that the notification shall contain a statement of the reasons for the action taken. They held that the following observation of Swift, J., in *Denby (William) and Sons, Limited* v. *Minister of Health*[1], was applicable to the facts of the case before them:

> "His enquiry must be an enquiry which is fair to all parties interested. He must hear everything which any of them desire to say and should not hear anything without giving an opportunity to the other parties interested to answer that which is said; he should not receive anything from one behind the back of the other, and although he is not bound in any sense by the rules of evidence or procedure which apply to an ordinary Court of law, he must, before making his report, comply with the ordinary dictates of natural justice as to the obtaining and consideration of the matters which go to form the opinions or conclusions which he presses in his report."

14. The Supreme Court was concerned in *Radeshyam* v. *State of Madhya Pradesh*[2], with section 53-A of the C.P. and Berar Municipalities Act, 1922, according to which, if a committee is not competent to perform the duties imposed on it or undertaken by it by or under the provisions of that Act or any other enactment and the State Government considers that a general improvement in the administration of the municipality is likely to be secured by the appointment of a servant of the Government as the Executive Officer of the Committee, the State Government, may by an order stating the reasons therefor published in the Gazette, appoint such servant as the Executive Officer of the Committee for such period not exceeding eighteen months. Under section 57 of that Act, if the Committee is not competent to perform or persistently makes default in the performance of the duties imposed on it or undertaken by it under that Act or any other enactment or exceeds or abuses its powers to a grave extent, the State Government, may by an order stating the reasons thereafter published in the Official Gazette declare the committee to be incompetent and supersede it for a period to be specified in the order. In that case the learned Chief Justice formulated the principle deducible from the various judicial decisions considered by the Supreme Court in *Province of Bombay* v. *Khusaldas S. Advani*[1], thus:

> "(*i*) that if a state empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis*, and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and
>
> (*ii*) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the

1. L.R. (1936) 1 K.B. 337.
2. 1959 S.C.J. 6 : 1959 S.C.R. 144 : (1959) 1 An.W.R. (S.C.) 5 : (1959) 1 M.L.J. (S.C.) 5 : A.I.R. 1959 S.C. 107.

1. 1950 S.C.J. 451 : (1950) 2 M.L.J. 703 : 1950 S.C.R. 621 : A.I.R. 1950 S.C. 222.

final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

S.R. Das, C.J., has observed in that decision that to say that action to be taken under section 53-A is an administrative action is not to say that the State Government has not to observe the ordinary rules of fair play. However, the learned Chief Justice preferred not to express any opinion on the question whether the act performed by the State Government was quasi-judicial or administrative in character. But S.K. Das, J., held that it was administrative in nature and not amenable to a writ of *certiorari*. Subba Rao, J., as he then was, who differed from the majority, has observed :

"The committee is comprised of elected representatives of the respective constituencies, they are presumably competent men in whom the electorate has confidence. The Government has to arrive at the finding of their incompetency on the basis of objective facts to be ascertained and to give reasons for its finding. It is against all canons of natural justice that a Tribunal should arrive at a finding of far-reaching consequence without giving an opportunity to explain to the persons who would be affected by such a finding. For the aforesaid reasons I have no doubt that the section imposes a duty on the Government to act judicially in ascertaining the objective and jurisdictional fact, namely, whether the committee is incompetent. It is a necessary condition of such a duty to give an opportunity to the committee to explain the grave charges levelled against it."

The Court in that case upheld the order of the Government superseding the committee.

14. This Court in *State of Madras* v. *Tirunelveli Municipal Council*[1], had to deal with section 41 (1) of the Madras District Municipalities Act, according to which ; if in the opinion of the State Government a council is not competent to perform or persistently makes default in performing the duties imposed on it by law or exceeds or abuses its powers, the State Government may, by noification, direct that the council be dissolved and reconstituted on such dates as the StateGovernment may fix in that behalf or, they may, if they think necessary, supersede the council for a specified period not exceeding two years and the notification shall be placed before both Houses of the State Legislature. Anantanarayanan, CJ., with whom Ramakrishnan, J., agreed except for giving some more reasons, held that the exercise of the power conferred by section 41 of the Madras District Municipalities Act is essentially an administrative power, in which the exercise of the power depends on the subjective satisfaction of Government and that the decision is subject to the quasi-judicial process made, obligatory by section 41 (I-A) and to principles of natural justice. The learned Chief Justice further observed that if the quasi-judicial character of the process has not been adhered to or any principle of natural justice has been violated, the Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India, will not hesitate to strike down the order, but the adequacy of the material, provided it is relevant, and the wisdom or otherwise of the actual exercise of that power do not concern the Court. The learned Judges have thus held that even in the exercise of administrative power, quasi-judicial character of the process has to be adhered to and principles of natural justice should not be violated and that if there is any such violation, the Court will exercise its powers under Article 226 and strike down the order.

15. The Supreme Court has observed in *Mahabir Prasad* v. *State of U.P.*[1]:

"The order passed by the District Magistrate cancelling the licences was quasi-judicial; it could be made only on a consideration of the charges and the explanation given by the appellants. That necessarily implied that the District Magistrate has to give some reasons why he held the charges proved, and the explanation unacceptable.... It must appear not merely that the authority entrusted with quasi-judicial

1. (1967) 1 M.L.J. 47.

1. (1971) 1 S.C.J. 256 : (1971) 1 S.C.R. 201 : A.I.R. 1970 S.C. 1302.

authority has reached a conclusion on the problem before him ; it must appear that he has reached a conclusion which is according to law and just, and for ensuring that and he must record theultimate mental process leading from the dispute to its solution. Satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appeal to the authority. Recording of reasons in support of a decision on a disputed claim by a quasi-judicial authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. A party to the dispute is ordinarily entitled to know the grounds on which the authority has rejected his claim. If the order is subject to appeal, the necessity to record reasons is greater, for without recorded reasons the appellate authority has no material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just."

In the present case also, the petitioner had disputed that he was guilty of any of the 10 charges framed against him by the first respondent. The first respondent has not heard the petitioner and does not appear to have had any material before him for rejecting the explanation of the petitioner as unsatisfactory or unacceptable for coming to the conclusion that 9 out of the 10 charges are proved. The petitioner has not been informed of the grounds on which the first respondent has rejected his claim that he was not guilty of the charges. In these circumstances, , it could not be stated that the decision of the first respondent that the petitioner was guilty of 9 out of the 10 charges is either supported by reasons or is just and that principles of natural justice have been complied with.

16. In Seervai's Commentary on the Constitutional Law of India, Second Edition, at page 881 it is stated thus:

" Broadly speaking, the development of the law of *certiorari* particularly with reference to natural justice has passed through the following stages :-

A. *The first stage.*—In this stage, Advani's case *Bombay* v. *K.S. Advani*[1] with its approval of Nakkuda Ali's case" was the leading authority, and the Courts adopted the tests laid down by Kania, CJ., or by Das, J., or by both in Advani's case or distinguishing judicial from administrative action.

B. *The second stage.*—This stage began with *Associated Cement Companies Ltd.* v. *P.M. Sharma*[2], in which Gajendragadkar, CJ., said that 'the test prescribed by Lord Reid in his judgment (in *Ridge* v. *Baldwin*[3]) may afford considerable assistance in deciding whether a particular law requires a quasi-judicial approach. This stage came to an end with Binapani's case which marked the beginning of the third stage.

C. *The third stage.*—This stage is dominated by the Binapani case in which without any discussion of earlier authorities, and without any express reference to *Ridge* v. *Baldwin*[3], but obviously, with the majority judgments in that case in mind, Shah, J., laid down the wide general proposition about the duty to act judicially.........

D. *The fourth stage.*—The fourth stage began with *A.K. Kraipak* v. *Union*[4]. (*Kraipak's case*). This case reflects the great changes which have taken place in England about the scope and ambit of *certiorari*, with special reference to natural justice, which we have considered in section I—decisions, which have gone far to blur the distinction between judicial and administrative action and in which the concept of the duty to act fairly began to play an important part. That stage is still with us."

17. The last decision relied upon by the learned counsel for the petitioner is that of the Full Bench of the Kerala High Court in *Mayer Simon* v. *Advocate-General.*[5] In that case, the learned Chief Justice, who spoke for the majority, extracted the

1. 1950 S.C.J. 451 : 1950 S.C.R. 621.
2. (1966) 1 S.C.J. 786 : (1965) 2 S.C.R. 366: A.I.R. 1965 S.C. 1595.
3. (1964) A.C. 40.
4. (1970) 1 S.C.J. 381 : (1970) 1 S.C.R. 457: A.I.R. 1970 S.C. 150.
5. A.I.R. 1975 Ker. 57.

following observation of Lord Denning in *Breen* v. *Amalgamated Engineering Union*[1]

"It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It is does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand or what you will. Still, it must act fairly. It must in a proper case, give a party a chance to be heard, and Edmund Davies, L.J. adopted those 'powerful observations"

and observed :—

"The decisions referred to above in this paragraph are the re-statement of the law in the light of the famous decision of the House of Lords in *Ridge* v. *Baldwin*[2], wherein the House of Lords disagreed with the view taken by the Court of Appeal relying on *Nakkuda Ali's case*[3] that the committee was acting only in an administrative capacity. The House of Lords reversed the decision on the ground that the committee had not, as found by the Court, observed the rules of natural justice."

The development of the law in India has been on similar lines. In *State of Orissa* v. *Binapani Dei*[4], the Supreme Court had to consider whether the declaration by the State Government of Orissa that Dr. Binapani Dei, should be deemed to have retired on April, 1962 subject to extension of service granted from 16th April, 1962 till the afternoon of 15th July, 1963, was liable to be interfered with in proceedings under Article 226 of the Constitution. Notwithstanding the finding that the order passed by the State Government was administrative in character, it upheld the decision of the High Court getting aside the order of the State.

The reasons are stated thus:

"It is true that some preliminary enquiry was made by Dr. S. Mitra. But the report of that enquiry office was never disclosed to the first respondent. Thereafter the first respondent was required to show cause why 16th April, 1907 should not be accepted as the date of birth and without recording any evidence the order was passed. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is an administrative order which involves civil consequences, as already stated, it must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken. The High Court was, in our judgment, right in setting aside the order of the State."

1. (1971) 1 All E.R. 1148.
2. (1963) 2 All E.R. 66.
3. (1951) A.C. 66.
4. (1967) 2 S.C.J. 339 : (1967) 2 S.C.R. 25 : A.I.R. 1967 S.C. 1269.

18. In *Union of India* v. *Anglo Afghan Agencies*[1], the same principle was again applied. The question was whether the petitioner under Article 226 of the Constitution had obtained import entitlement up to the value of the goods exported. The Textile Commissioner acted upon the report of the committee appointed by him and before the committee the respondents had no opportunity to present their case. He collected the evidence *ex parte* and did not disclose it to the respondents and without giving an opportunity to them to represent their case reduced the import entitlement. In dealing with the representations made by the respondents, the Government of India also declined either to make available the evidence on which the Textile Commissioner had acted or to give a hearing to the respondents. It was held:

"But the authority vested in the Textile Commissioner by the rules even though executive in character was from its nature an authority to deal with the matter in manner consonant with the basic concept of justice and fair play, if he made an order which was not consonant with the basic concept of justice and fair play his proceeding was open to scrutiny and rectification by the Courts."

1. (1968) 2 S.C.R. 366 : (1968) 2 S.C.J. 889: A.I.R. 1968 S.C. 718.

19. In *A.K. Kraipak* v. *Union of India*[1], the principle of natural justice was applied. It should be applied, the Court said:

> " even in the administrative enquiries as well. The inclusion of Naquishbund in the Selection Board when he was himself one of the persons to be considered for selection, was held to vitiate the proceeding as violative of one of the basic principles of natural justice."

The Court observed:—

> "Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is not questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries."

Even an order, administrative in nature affecting property will have to be made in a manner consonant with the rules of natural justice was reiterated in *D. F. O. South Kheri* v. *Ram Sanehi Singh*[2], though the right to the relief arose out of an alleged breach of contract. The action was that of a public authority invested with statutory powers. That the principle of natural justice applied to administrative orders was again restated in *Kesava Mills Co., Ltd.* v. *Union of India*[3]. The essential point ruled their Lordships:

> "What has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly."

1. (1970) 1 S.C.J. 381 : (1970) 1 S.C.R 457 : A.I.R. 1970 S.C. 150.
2. (1971) 3 S.C.C. 864 : A.I.R. 1973 S.C. 205.
3. (1973) 3 S.C.R. 22 : (1973) 1 S.C.C. 380: A.I.R. 1973 S.C. 389.

The principles above stated do not appear really to be a new development of the law for it was so laid down as early as in 1863 in *Cooper* v. *Wandsworth Board of Works*[1]. This decision was noticed and a passage therefrom had been quoted by Chief Justice M. S. Menon in paragraph 9 of the judgment in *Kochunni Nayar* v. *District Collector, Alleppy*[2]. This decision seems to have been under an eclipse, or, as a recent writer has put it, "seems almost to have perished for lack of support, but in recent years as we shall see, has been given the kiss of life." It is remarkable that the law had been laid down so early and if we may say so with great respect so lucidly. The facts were these. The Board of Works had power to demolish the plaintiff's house if the building had been erected without previous notice being given to the Board and the Board exercised the power and demolished the plaintiff's house. It was argued that while the words of the statute taken literally justified the Board's Act, its power was subject to the qualification that no man is to be deprived of his property without having an opportunity of being heard. The argument was accepted. In the words of Byles, J.

> "Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

Erle, CJ., rested his judgment not solely on the ground that the Board's act was judicial:

> 'But the law has been applied to many exercises which in common understanding would not be at all more a judicial proceeding; that would be the act of the district board in ordering a house to be pulled down."

For a long time now Courts have been claiming the right to interfere with the exercise of an administrative discretion. The 1891 dictum of Lord Halsbury in *Sharp* v. *Wakefield*[3], was characteristic of this:

1. (1863) 14 C.B.N.S. 180.
2. (1957) Ker.L.T. 1041.
3. (1891) A.C. 172.

"......when it is said that something is to be done within the discretion of the authorities........that something is to be done according to the rules of reason and justice, not according to private opinion......according to law and not humour. It is to be not arbitrary, vague fanciful, but legal and regular."

20. In the light of the decisions relied upon by the learned counsel for the petitioner and referred to above, we are of the opinion that what is done by the Inspector under section 149-A (11) of the Act to the prejudice of the President without accepting the view of the Panchayat expressed in favour of the President, is a quasi-judicial act, for which reasons have necessarily to be given and that even if it is administrative in character, reasons must have been given by the Inspector for coming to the conclusion that the petitioner was guilty of 9 out of the 10 charges, as had been held by the first respondent, so that the petitioner may be aware for what reasons or on what grounds his explanations had been rejected and he had been found guilty of the 9 charges, and that since no reason could be found in the impugned orders, and no material could be placed before the Court, this Court is entitled to interfere by exercising the powers conferred under Article 226 of the Constitution and set aside the orders. In this view, we are of opinion that it is not necessary to place the additional grounds raised in the writ petition before a Bench of five Judges. We allow the writ petition and quash the impugned orders of the respondents with costs. [Advocate's fee Rs. 300.

21. We agree with Ramanujam, J., the presence of the appellant as a party in the writ petition is not necessary to enable the Court to effectively and completely adjudicate upon and decide the questions involved in the writ petition and that the appellant has not acquired any right to be added as a party by the stop-gap arrangement made by the first respondent requesting the appellant to act as President of the Panchayat until another President is elected in accordance with the provisions of the Act. We dismiss the writ appeal, but under the circumstances of the case, without costs.

R.S. ——— *Writ petition allowed.*
Writ appeal dismissed.

[END OF VOLUME (1978) 1 M.L.J. (REPORTS).]

The Madras Law Journal Reports

(The Supreme Court)

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*H.R. Khanna and V.R. Krishna Iyer, JJ.*

M/s. V. Guruviah Naidu and Sons, etc. .. *Appellants**

v.

State of Tamil Nadu and another .. *Respondents.*

Madras General Sales Tax Act (I *of* 1959), *Second Schedule, items* 7 (a) *and* 7 (*b*)—*Constitutional validity—Constitution of India* (1950), *Article* 304 (a)—*Scope.*

The argument that item 7 (*a*) of the Second Schedule to the Madras General Sales Tax Act would cover also inter-State sales and as such is beyond the competence of the State Legislature is untenable. Item 7 (*a*) relates only to intra-State sales and not to inter-State sales. This is clear from the language used in the item, especially the words 'purchase in the State.' Assuming that the language of item 7 (*a*) is ambiguous, it should be so construed as would sustain the constitutional validity of the said item.

[*Para.* 4.]

Article 304 (*a*) of the Constitution does not prevent levy of tax on goods: what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and item of goods in respect of the sale on which it is levied. The scheme of items 7 (*a*) and 7 (*b*) is that in case of raw hides and skins which are purchased locally in the State, the levy of tax would be at the rate of 3 per cent. at the point of last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides and skins, no levy would be made on such sales as those hides and skins have already been subjected to local tax at the rate of 3 per cent. when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of tax is at the rate of 1¼ per cent. at the point of first sale in the State of the dressed hides and skins. This levy cannot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. [*Para.* 9.]

Cases referred to :—

Firm A.T.B. Mehtab Majidi and Co., v. *The State of Madras,* (1962) 14 S.T.C. 355:

* C.As. Nos. 1577 and 1579 (N.T.) of 1971.
2nd November, 1976.

(1964) 1 An.W.R. (S.C.) 115: (1964) 1 M.L.J. (S.C.) 115: (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928; *A. Hajee Abdul Shukoor & Co.* v. *The State of Madras*, (1964) 15 S.T.C. 719: (1965) 1 S.C.J. 337: (1965) 1 M.L.J. (S.C.) 39: (1965) 1 An. W.R. (S.C.) 39: (1964) 8 S.C.R. 217: A.I.R. 1964 S.C. 1729.

Appeals from the Judgment and order dated 23rd March 1971 and 22nd April 1971 of the Madras High Court in Writ Petitions 1088 of 1970 and 1316 of 1971.

K. Srinivasan Senior, Advocate (*I. Subramanian* and *Mrs. S. Gopalakrishnan* Advocates, with him), for Appellant.

K. Parasaran, Advocate-General for the State of Tamil Nadu (*A. V. Rangam* and *Miss. A. Subhashini*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Khanna, J.—These appeals by special leave are against the judgment of the Madras High Court whereby that Court repelled the challenge to the validity of items 7 (*a*) and 7 (*b*) of the Second Schedule to the Madras General Sales Tax Act, 1959 (hereinafter referred to as the State Act).

2. The appellants are dealers in hides and skins. The appellants purchase raw hides and skins locally as well as in the course of inter-State trade and commerce. The raw hides and skins are converted into dressed hides and skins and are sold either locally or in the course of export. The matter relates to the assessment year 1968-69 and the dispute between the parties arises because of the inclusion in the turnover of the sale and purchase price of some of the above goods. The appellants by means of writ petitions challenged the validity of items 7 (*a*) and 7 (*b*) of the Second Schedule to the State Act. The High Court, as already mentioned, repelled the attack on the validity of those items and dismissed the writ petitions.

3. Before dealing with the contentions advanced, it may be appropriate to refer to the relevant provisions. Section 4 of the State Act is the charging section in respect of declared goods and reads thus:

> "*Tax in respect of declared goods.*—Notwithstanding anything contained in section 3, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule of the turnover in such goods in each year, whatever, the quantum of turnover in that year."

It may be mentioned that raw hides and skins as well as dressed hides and skins, are declared goods under section 14 (*iii*) of the Central Sales-Tax Act, 1956 (hereinafter referred to as the Central Act). Section 14 (*iii*) of the Central Act reads as under:

> "It is hereby declared that the following goods are of special importance inter-State trade or commerce:
>
> ....
>
> ....
>
> (*iii*) hides and skins, whether in a raw or dressed state."

Items 7 (*a*) and 7 (*b*) of the Second Schedule to the State Act read as under:

Serial No. 1	*Description of goods* 2	*Point of levy* 3	*Rate of tax* 4
7 (*a*)	Raw hides and skins	At the point of last purchase in the State	3
7 (*b*)	Dressed hides and skins (which were not subjected to tax under this Act as raw hides and skins)	At the point of 1st sale in the State.	1¼

4. So far as the validity of item 7 (*a*) of the Second Schedule is concerned, the argument of the learned counsel for the appellant is that this would cover also inter-State sales and as such is beyond the competence of the State Legislature. We are unable to accede to this contention as we are of the view that item 7 (*a*) relates only to intra-State sales and not to inter-State sales. This is clear from the language used in the item, especially the words "purchase in the State". Assuming that the language of item 7 (*a*) is ambiguous, it should be so construed as would sustain the constitutional validity of the said item. Considered in this light the occasion for the levy of tax under the above item would arise only when there is intra-State sale and not inter-State sale.

5. Regarding item 7 (*b*), the learned counsel for the appellants has contended that it is violative of clause (*a*) of Article 304 of the Constitution. The said clause reads as under:

"304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(*a*) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(*b*) ...."

According to the learned counsel, there can be three types of sale transactions in respect of dressed hides and skins:

(1) Dressed hides and skins imported from outside the State of Tamil Nadu and sold within that State;

(2) Import of raw hides and skins from outside the State of Tamil Nadu. Tanning of the aforesaid raw hides and skins within the State of Tamil Nadu and the sale of the same within that State as dressed hides and skins; and

(3) Purchase of raw hides and skins within the State of Tamil Nadu and sale of the same within that State as dressed hides and skins after tanning those hides and skins.

It is urged that in respect of hides and skins covered by the third category, the local sales of dressed hides and skins will not be liable to tax under the State Act as the purchase of the raw hides and skins has already been subjected to tax under item 7 (*a*). Regarding hides and skins mentioned at (1) and (2) above, the local sales of dressed hides and skins would be subject to tax at the rate of 1¼ per cent. under item 7 (*b*) as there was no levy of tax under the State Act in respect of those hides and skins. Learned counsel accordingly concludes from the above that imported hides and skins are subject to tax when sold as dressed hides and skins at the rate of 1¼ per cent. whereas hides

and skins purchased in raw form locally and dressed thereafter are not subject to tax under the State Act when sold as dressed hides and skins. The contention, in other words, is that whereas dressed hides and skins sold locally but which have been made out of imported raw hides and skins are subject to tax, similar sales of dressed hides and skins made out of raw hides and skins which have suffered tax at purchase stage are not subject to tax under item 7 (*b*) of the Second Schedule of the State Act. Item 7 (*b*) is therefore stated to be discriminatory and violative of Article 304 (*a*). Reliance in this connection is placed upon two decisions of this Court in the cases of *Firm A.T.B. Mehtab Majid & Co.* v. *The State of Madras and another*[1], and *A. Hajee Abdul Shukoor & Co.* v. *The State of Madras*[2].

6. In the case of *Mehtab*[1], this Court held that the provisions of rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 discriminate between hides and skins imported from outside the State and those manufactured or produced inside the State and therefore they contravene the provisions of Article 304 (*a*) of the Constitution. Perusal of the facts of that case goes to show that the real grievance of the appellant in that case was that though there was a substantial disparity in the price of raw hides and skins and the price of dressed hides and skins, the same rate of tax was levied in respect of both types of hides and skins under section 3 (1) (*b*) of the State Act. This is clear from the following observations in that case:

"The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under section 3 (1) (*b*) of the Act. If the dealer has purchased the raw hides or skins in the State, he does not pay on the sale price of the tanned hides or skins; he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales tax on the sale price of the tanned hides or skins."

7. In the case of *Hajee Abdul Shukoor*[1], this Court held that sub-section (1) of section 2 of the Madras General Sales Tax (Special Provisions) Act, 1953, discriminates against imported hides and skins which were sold up to 1st August, 1957. The rate of tax on the sale of tanned hides and skins as would appear from that judgment was

"2 per cent on the purchase price of those hides and skins in the untanned condition, while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee".

The Court in this context referred to *Mehtab's case*[2], and observed:

"In the earlier case, discrimination was brought about on account of sale price of tanned hides and skins being higher than the sale price of untanned hides and skins, though the rate of tax was the same, while in the present case, the discrimination does not arise on account of difference of the price on which the tax is levied as the tax on the tanned hides and

1. (1963) 14 S.T.C. 355: (1964) 1 An.W.R. (S.C.) 115: (1964) 1 M.L.J. (S.C.) 115: (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928.

2. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 337 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217: A.I.R. 1964 S.C. 1729.

1. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 377 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217 : A.I.R. 1964 S.C. 1729.

2. (1963) 14 S.T.C. 355 : (1964) 1 An.W.R. (S.C.) 115 : (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928.

skins is levied on the amount for which those hides and skins were last purchased in the untanned condition, but on account of the fact that the rate of tax on the sale of tanned hides and skins is higher than that on the sale of untanned hides and skins. The rate of tax on the sale of tanned hides and skins is 2 per cent on the purchase price of those hides and skins in the untanned condition while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee. The difference in tax works out to 7/1600th of a rupee, *i.e.*, a little less than half naya paise per rupee. Such a discrimination would affect the taxation up to the 1st of August, 1957 when the rate of tax on the sale of raw hides and skins was raised to 2 per cent. of the sale price."

8. None of the circumstances which led this Court to strike down the relevant provisions in the above mentioned two cases exists in the present case. In *Mehtab's case*[1] discrimination was found to exist because of the fact that tax was being levied at the same rate in respect of both raw hides and skins as well as dressed hides and skins, even though the price of dressed hides and skins was much higher. The position was worse in the *case of Hajee Abdul Shukoor*[2] because in that case the sales tax was found to have been charged at a higher rate in respect of dressed hides and skins than that on the sale of raw hides and skins in spite of the fact that the price of dressed hides and skins was higher than that of raw hides and skins. The position in the present case is materially different, for here the rate of sales tax for raw hides and skins is 3 per cent., while that for dressed hides and skins is 1¼ per cent. It is plain that the lower rate of tax in the case of dressed hides and skins has been prescribed with a view to offset the difference between the higher price of dressed hides and skins and the lower price of raw hides and skins. No material has been brought on the record to show that despite the lower rate of sales tax for dressed hides and skins, the imported hides and skins are being subjected to discrimination. The onus to show that there would be discrimination between the hides and skins which were purchased locally in the raw form and thereafter tanned and the hides and skins which were imported from other States was upon the appellant. The appellant, we find, has failed to discharge such onus.

9. Article 304 (*a*) does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent discrimination against imported goods by imposing tax on such goods at a rate higher than that borne by local goods since the difference between the two rates would constitute a tariff wall or fiscal barrier and thus impede the free flow of inter-State trade and commerce. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale of which it is levied. The scheme of items 7(*a*) and 7 (*b*) of the Second Schedule to the State Act is that in case of raw hides and skins which are purchased locally in the State, the levy of tax would be at the rate of 3 per cent. at the point of last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides and skins, no levy would be made on such sales as those

1. (1963) 14 S.T.C. 355 : (1964) 1 An.W.R. (S.C.) 115 : (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 S.C.J. 355 : A.I.R. 1963 S.C. 928.

2. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 337 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217 : A.I.R. 1964 S.C. 1729.

hides and skins have already been subjected to local tax at the rate of 3 per cent. when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of the tax is at the rate of 1½ per cent. at the point of first sale in the State of the dressed hides and skins. This levy connot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. The Legislature, it seems, calculated the price of hides and skins in dressed condition to be double the price of such hides and skins in raw state. To obviate and prevent any discrimination or differential treatment in the matter of levy of tax, the Legislature therefore prescribed a rate of tax for sale of dressed hides and skins which was half of that levied under item 7 (*a*) in respect of raw hides and skins.

10. Lastly, it has been argued that dressed hides and skins are a commodity distinct and separate from raw hides and skins and that item 7 (*b*) of the Second Schedule makes a discrimination between the sales of locally processed dressed hides and skins and those imported from other States. In this respect we find that it is not the case of the appellants that they import dressed hides and skins from other States and sell them as such in Tamil Nadu. On the contrary, the case of the appellants is that what they import from other States are only raw hides and skins which are thereafter tanned and sold as dressed hides and skins. In the circumstances, it is not clear as to what grievance the appellants can have on the score that there is discrimination between imported dressed hides and skins and the dressed hides and skins produced and manufactured within the State.

11. Apart from that it seems to us that even though dressed hides and skins have been treated as separate commodity, there is a clear nexus between hides and skins in raw form and those in dressed form. So far as the Central Act is concerned, both the raw as well as the dressed hides and skins are specified together in clause (*iii*) of section 14. It has to be ome in pmind that it is raw hides and skins which after being subjected to brocessing or tanning take the shape of dressed hides and skins. Dressed hides and skins cannot, therfore, be considered in isolation and we find no infirmity in a legislative provision which while levying tax on the sale of dressed hides and skins takes into account the levy of tax in respect of the purchase of raw hides and skins. Looked at in this light there appears to be no warrant for the proposition that preferential treatment has been shown to dressed hides and skins prepared from locally purchased raw hides and skins compared to the treatment accorded to imported hides and skins.

12. We are, therefore, of the view that the attack on the validity of item 7 (*b*) of the Second Schedule to the State Act is not well founded. We accordingly dismiss the appeals, but in the circumstances without costs.

V.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*A. N. Ray, C J, M. H. Beg and V. R. Krishna Iyer, JJ.*

Cumbum Roadways (P.) Ltd .. *Appellant**

v.

Belaguru Bus Service Pvt. Ltd, and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 47—State Carriage permit—Grant of—Criteria..

Permits cannot be equated with distribution of patronage. It must be remembered that public interest is at stake when public transport services are operated. The scheme of the statute, *viz.*, the Motor Vehicles Act is that he who can serve the travelling public best, is to be chosen as the permit holder. Considerations of grace, charity and compassion at the expense of public interest are an act of unfairness to the Act.

[*Para.* 3].

The Judgment of the Court was delivered by

Krishna Iyer, J.—This appeal, without any merit, deserves to be dismissed without much ado..

2. The few facts of the case are that the appellant and the respondent, both operators of stage carriages, applied for a permit on an 86 Km. route. Marks were awarded to both under the relevant Motor Vehicles Rules to settle their comparative merit. The appellant secured 8.79 marks and the respondent 12.09. The latter thus secured an easy arithmetical victory over the former and the sense of the scheme would have ordinarily led to the award of the permit to the respondent. However, the Road Transport Authority preferred the candidate with the lesser marks on the compassionate ground that the rival with the better marks had already got a permit a couple of months before, on an overlapping route of 53 Km. On appeal, the Appellate Tribunal set aside this award and granted the permit to the one who had more merit. This has been affirmed throughout, repelling the challenge by writ petition. The aggrieved appellant contends that his permit should not have been set aside, the ground being that the respondent had got an earlier permit on a part of the route. We are not persuaded about this ground being good.

3. Permits cannot be equated with distribution of patronage. We must remember that public interest is at stake when public transport services are operated. The scheme of the statute, *viz.*, the Motor Vehicles Act is that he who can serve the travelling public best, is to be chosen as the permit-holder. Considerations of grace, charity and compassion at the expense of public interest are an act of unfairness to the Act. The conclusion, therefore, is that the appellant's claim was rightly rejected and the respondent's award was rightly made.

4. We dismiss the appeal but in the circumstances without costs.

V.K. —— *Appeal dismissed.*

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* C.A.No.424 of 1971.

10th December, 1976.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*A.N. Ray, CJ. M.H. Beg and P.N. Shinghal, JJ.*

Madras Refineries Ltd. .. *Appellant**

v.

Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Respondent.*

Stamp Act (*II of* 1899), *sections* 2 (17), 4 (1) *and* 40 (b)—*Scope—Stamp duty on mortgage—Deed—Principal document, test.*

A Loan and Note Purchase Agreement was executed on 20th December, 1966, between the appellant—company and the First National City Bank and others. Under that agreement the Company was to authorise the creation and issuance of secured notes, serials A and B and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the Company and the First National City Bank" It was further stated: "The notes shall be dated, shall mature, shall bear interest shall be payable, shall be secured and shall have such other terms and provisions as provided in the mortgage and shall be guaranteed by the President of India pursuant to the terms of a Guarantee Agreement (the "guarantee agreement"). in the form attached hereto as Exhibit.3"

On the question whether the instrument relating to the Deed of Trust and Mortgage would attract the levy of a stamp duty as laid down in Article 40 (*b*) of Schedule I of the Indian Stamp Act,

Held: (*i*) It is the real and true meaning of the instrument which will determine the stamp duty. It was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the guarantee agreement. The Trust and Mortgage Deed was thus executed before the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, 15th June, 1967. This Deed of Trust and Mortgage was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It could not be said to be a "collateral agreement". The parties in fact clearly stated it in Article 1 of the Deed. The guarantee Agreement was not an instrument of sale, mortgage or settlement, and did not fall within the purview of sub-section (1) of section 4 of the Act. It was the Deed of Trust and Mortgage which was a "mortgage deed" within the meaning of clause 17 of section 2 of the Act, and it was, therefore, clearly chargeable with stamp duty at the rate prescribed in Article 40 (*b*) of Schedule 1 of the Act.

[*Paras.* 5, 6, 7, 9, 10, 12, 13.]

Case referred to:

Lim or Asphalte Paving Co. v. I.B.C., 1 (1872) 7 Ex. 211.

P. Ram Reddy, Senior Advocate (*C. Rama-Krishna* and *A.V. Nair*, Advoates, with him), for Appellant.

I.P. Raman, Additional Solicito General (*A.V. Rangam* and *Miss A. Subbashini*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shinghal, J.—This appeal by special leave arises out of the decision of the Madras High Court dated 9th October 1974, on a reference by the Chief

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*C.A. No. 709 of 1975. 5*th January*, 1977

Controlling Revenue Authority under section 57 of the Indian Stamp Act, 1899, hereinafter referred to as the Act. The Board of Revenue, Madras, which was the Chief Controlling Revenue Authority, initially stated the case raising the following questions for decision:—

(a) Whether the decision of the Board of Revenue that the instrument relating to the Deed of Trust and Mortgage would attract the levy of a Stamp Duty as laid down in Article 40 (b) of Schedule I of the Indian Stamp Act and that the debentures would be exempted from the levy of stamp duty is correct or not; and

(b) Whether the claim of the Respondent herein that the stamp duty is payable on the debenture under Article 27 (a) and on the Deed of Trust and Mortgage under Article 40(c) is tenable or not? The High Court directed the Board of Revenue to refer three additional questions, but ultimately took the view that the additional questions did not really arise in the case. It answered the first question in favour of the Revenue and the second question against the Madras Refineries Limited, hereinafter referred to as the Company. The Company feels aggrieved and has come up in appeal to this Court. It will be enough to state those facts which bear on the controversy before us.

2. The Company was incorporated under the Indian Companies Act, 1956, as a public limited company. An agreement known as the Loan and Note Purchase Agreement was executed between the Company and the First National City Bank and six others on 20th December 1966, by which the Company agreed to authorise the creation and issuance of $ 14,880,000 (U.S.) principal amount of its 5½ per cent. secured notes Series 'A', and $ 7,440,300,(U.S.) principal amount of its 5½ per cent. secured notes Series 'B', and the sale of, or the borrowing to be evidenced by such Notes in accordance with the terms and provisions of the agreement. The Notes were to be issued under and secured by a Deed of Trust and Mortgage between the Company and the First National City Bank. It was also agreed that the Notes shall be secured and shall have the other terms and provisions provided in the agreement and shall be guaranteed by the President of India pursuant to the terms of a "Guarantee Agreement", in the prescribed form. We shall have occasion to refer to the relevant clauses of the Loan and Note Purchase Agreement, the Deed of Trust and Mortgage and the Guarantee Agreement as and when necessary. The Deed of Trust and Mortgage and the Guarantee Agreement were executed between the President and the First National City Bank (as Trustee) on 15th June, 1967. In the meantime the Company made an application to the Collector under section 31 of the Act for opinion as to the stamp duty with which the Deed of Trust and Mortgage was chargeable, and the Collector referred the matter to the Board of Revenue. The Board decided on 28th June, 1967 that the duty was chargeable on the Trust and Mortgage Deed under Article 40(b) of Schedule I to the Act. The Company paid Rs. 37,66,500 as stamp duty under protest, stating that it would move the Board for a reference of the controversy to the High Court. The Trust and Mortgage Deed was registered on 30th June, 1967, and the 'A' series debentures were issued the same day. The Company applied to the Board of Revenue to state the case to the High Court. 'B' series debentures were issued on 28th June, 1968. The case was started on 28th March, 1969 and was decided by the impugned decision of the High Court dated 9th October, 1974.

3. It has been argued by Mr. Ram Reddy for the appellant company that

the Guarantee Agreement was the principal and primary security and the Deed of Trust and Mortgage was a collateral or auxiliary security and that the stamp duty on the Deed of Trust and Mortgage was payable in accordance with Article 40 (c). It has been urged that the Guarantee Agreement was exempt from duty under section 3 of the Stamp Act and the debentures were exempt under Article 27.

4. The controversy centres round the question whether the Guarantee Agreement could be said to be the principal or primary security? Mr. Ram Reddy has invited our attention to the following passage in Sergeant on Stamp Duties and Companies Capital Duty, sixth edition page 6,—

> "*Leading and principal object,*—
>
> With reference to the stamp duty upon instruments generally, it is a well settled rule of law that an instrument must be stamped for its leading and principal object, and the stamp covers everything accessory to that object."

5. In *Limmer Asphalte Paving Co.* v. *I.R.C.*[1] it was stated.—

> "In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare."

This appears to be a correct statement of the law. We have therefore to determine the real and true meaning of the Guarantee Agreement and to decide whether it could be said to be the principal and primary security.

6. The Loan and Note Purchase Agreement was executed on 20th December, 1966, between the company and the First National City Bank and others. Under that agreement, the company was to authorise the creation and issuance of secured notes, series A and B, referred to above, and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the company and the First National City Bank." It was then stated in the Loan and Note Purchase Agreement as follows:—

> "The Notes shall be dated, shall mature, shall bear interest, shall be payable, shall be secured and shall have such other terms and provisions as provided in the Mortgage and shall be guaranteed by the President of India pursuant to the terms of a Guarantee Agreement (the "Guarantee Agreement) in the form attached hereto as Exhibit 3".

It would thus appear that it was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the Guarantee Agreement.

7. As has been stated, the Guarantee Agreement was made between the President of India and the First National City Bank. It was clearly stated in that agreement that the First National City Bank executed it "as Trustee under a Deed of Trust and Mortgage dated as of 15th June 1967." The Trust and Mortgage Deed was thus executed before the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, 15th June, 1967.

8. It is true that it has been stated in the Guarantee Agreement that the Presi-

1. (1872) 7 Ex. 211.

dent of India, as the guarantor, unconditionally guaranteed "as primary obligor and not as surety merely, the due and punctual payment from time to time" of the principal as well as the interest etc., stated in the agreement. And it was for that purpose that the guarantor agreed to "endorse upon each of the Notes at or before the issue and delivery thereof by the Company its guarantee of the prompt payment of the principal, interest and premium thereof and of the other indebtedness". It is also true that as stated in paragraph 10 of the Guarantee Agreement, the obligations of the guarantor were "absolute and unconditional under any and all circumstances, and shall not be to any extent or in any way charged, impaired or otherwise affected, except by performance thereof in accordance with the terms thereof." We have also noticed the further stipulation that "Each and every remedy of the Trustee shall, to the extent permitted by law, be cumulative and shall be in addition to any other remedy given hereunder or under the Mortgage or any of the other collateral or now or hereafter existing at law or in equity or by statute."

9. Mr. Ram Reddy has relied heavily on these averments in the Guarantee Agreement, but they cannot detract from the basic fact that the Deed of Trust and Mortgage was executed first in point of time and was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It was that document which constituted the First National City Bank as the Trustee, and enabled it to enter into the Guarantee Agreement with the President, and the President guaranteed the due performance of the obligations undertaken by the company thereunder.

10. The Deed of Trust and Mortgage, which was executed between the company and the First National City Bank as a national banking association incorporated and existing under the laws of the United States of America, stated that as the company was in the process of constructing a refinery for the refining of crude oil and deemed it necessary to borrow money from time to time to finance such construction and to issue its Notes therefor and to "mortgage and charge its properties hereinafter described to secure the payment of such notes" it executed the Deed of Trust and Mortgage as security in accordance with the terms and conditions of Article 2 of the Deed of Trust and Mortgage to secure the due payment of the principal of and the premium, if any, and the interest on the Notes and of all other moneys for the time being and from time to time owing on the security of that Indenture and on the Notes and the performance by the company of all of its obligations thereunder. The Deed of Trust and Mortgage was therefore clearly the principal or the primary security and could not be said to be a "collateral agreement". The parties in fact clearly stated in Article 1, section 1.01 of the Deed of Trust and Mortgage as follows:—

> "*Collateral Agreements*
>
> The term "Collateral Agreements" shall mean the Guarantee Agreement and the Undertaking, hereinafter defined."

It was therefore specifically agreed between the parties that the Deed of Trust and Mortgage was not a collateral agreement.

11. In all these facts and circumstances it is futile to contend that the Deed of Trust and Mortgage was not the principal or primary security. As was stated in Article 9 of that document, that security became enforceable in case of any or more "events of default", and it cannot be said that merely because the

Guarantee Agreement contained the stipulation that the President, as the Guarrantor, unconditionally guaranteed the due and punctual payment of principal and interest etc. "as primary obligator and not as surety merely" that agreement became the principal or the primary security. It is the real and true meaning of the Deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained, and this leaves no room for doubt that the view taken by the High Court in this respect is correct and does not call for interference. Mr. Ram Reddy relied on some decisions to support his argument that the Guarantee Agreement was the security for the loan and was the principal or the primary document, but those cases were decided on different facts and have no real bearing on the controversy before us.

12. The Guarantee Agreement was executed for and on behalf of the President by his Authorised Representative, and no stamp duty was chargeable for it by virtue of the proviso to section 3 of the Act. That in fact appears to be the reason why counsel for the appellant strenuously argued that we should hold it to be the principal instrument, for he has next argued that the case falls within the purview of section 4 (1) of the Act and the "principal instrument" only would be chargeable with the duty prescribed in Schedule I, and deed of any trust and mortgage would be chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in that Schedule. We find however that there is no merit in this argument also. Sub-section (1) of section 4 of the Act reads as follows:—

"4. *Several instruments used in single transaction of sale, mortgage or settlement.*—(1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of four rupees fifty naye paise instead of the duty (if any) prescribed for it in that Schedule."

It is nobody's case that the Guarantee Agreement was an instrument of sale, for it did not transfer the ownership of anything in exchange for a price paid or promised or part-paid and part-promised. It was also not an instrument of mortgage because it is nobody's case that there was any transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or an existing or a future debt or the performance of an engagement which could give rise to a pecuniary liability. The expression "settlement" has been defined in clause (24) of section 2 of the Act as follows:—

"'Settlement' means any non-testamentary disposition in writing, of movable or immovable property made:

(a) in consideration of marriage;

(b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(c) for any religious or charitable purpose:

and includes an agreement in writing to make such a disposition (and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition)".

The term "disposition" has been defined in Stroud's Judicial Dictionary as a devise

"intended to comprehend a mode by which property can pass, whether by act of parties or by an act of the law" and "includes transfer and charge of property." As the Guarantee Agreement did not have any such effect, it did not constitute a "settlement" also. That document was not therefore an instrument of sale, mortgage or settlement and did not fall within the purview of sub-section (1) of section 4 of the Act.

13. It was the Deed of Trust and Mortgage which was a "mortgage deed" within the meaning of clause (17) of section 2 of the Act, and it was therefore clearly chargeable with stamp duty at the rate prescribed in Article 40 (*b*) of Schedule I to the Act.

14. We have examined the other argument of Mr. Ram Reddy that even if the Guarantee Agreement was not the principal instrument, within the meaning of sub-section (1) of section 4 of the Act, we should hold that the debentures which were issued by the company were the principal and primary security, and that the Deed of Trust and Mortgage was the "other instrument" within the meaning of that sub-section and was chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in the Schedule. This argument is also futile for we find that the secured Notes (Series A and B) were issued under and were secured by the Deed of Trust and Mortgage. As such, the Notes were issued in consequence and on the security of the Deed of Trust and Mortgage and there is no justification for the contention that the debentures were the principal instruments, and not the Deed of Trust and Mortgage.

15. As the High Court has rightly answered both the questions, we find no force in this appeal and it is dismissed with costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—*Y. V. Chandrachud and P. K. Goswami, JJ.*

Palaniappa Gounder .. *Appellant**

v.

The State of Tamil Nadu and others .. *Respondents.*

Penal Code (XLV of 1860), *section* 302—*Criminal Procedure Code,* 1973 (*II of* 1974), *section* 357 (1) (c)—*Murder—Sentence of life—Imprisonment combined with heavy fine—Fine imposed to enable heirs of deceased to obtain compensation under section* 357 (1) (c)—*Propriety and legality of.*

There can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine under section 302 of the Penal Code. But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though therefore the High Court in the instant case had the power to impose on the appellant a sentence of fine along with the sentence of life-imprisonment under section 302 of Penal Code, the question still arises whether a sentence of fine of Rs. 20,000 is justified in the circumstances of the case. [*Paras.* 8, 9.]

We cannot go so far as to express approval of the unqualified view that a sentence of fine for an offence of murder is wholly inapposite. But before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so what is a proper or adequate fine to impose in the circumstances of the case. [*Para.* 9.]

Since by section 357 (1) (*c*) of the new Criminal Procedure Code and its precursor, section 545 (1) (*bb*) of the old

*Crl.A. No. 190 of 1976. *4th March,* 1977.

Code compensation can only come out of fine, it is always necessary to consider in the first instance whether the sentence of fine is at all called for, particularly when the offender is sentenced to death or life imprisonment. If so, the fine must not be excessive having regard to all the circumstances of the case, the motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine. [*Para.* 12.]

It appears that the High Court in the instant case first considered what compensation ought to be awarded to the heirs of the deceased and then imposed by way of fine an amount which was higher than the compensation because the compensation has to come-out of the amount of fine. Apart from the fact that even the compensation was not fixed on any reliable data, the High Court, put the cart before the horse in leaving the propriety of fine to depend upon the amount of compensation. The first concern of the Court, after recording an order of conviction, ought to be to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and sentence including the sentence of fine, must not be unduly excessive. The fine of Rs. 20,000 imposed by the High Court seems to be unduly excessive. In the circumstances it is reduced to a sum of Rs. 3,000 with a direction that the fine if realised, should be paid to the heirs of the deceased. [*Paras.* 11, 13.]

Cases referred to:—

State v. *Pandurang Shinde,* A.I.R. 1956 Bom. 711; *Adamji Umer Dalal* v. *The State of Bombay,* 1952 S.C.R. 172: 1951 S.C.J. 820: 54 Bom.L.R. 400: A.I.R. 1952 S.C. 14.

The Judgment of the Court was delivered by

Chandrachud, J.—The appellant, Palaniappa Gounder, was convicted by the learned Principal Sessions Judge, Salem, under section 302 of the Penal Code and was sentenced to death on the charge that on 23rd August, 1974 he had committed the murder of one Sengoda Gounder. The appellant's son and daughter-in-law were convicted by the learned Judge for abetting the murder and were sentenced to life imprisonment. The three accused filed an appeal in the High Court of Madras which upheld the appellant's conviction under section 302 but reduced the sentence from death to imprisonment of life. However, while reducing the substantive sentence the High Court imposed a fine of Rs. 20,000 on the appellant and directed that out of the fine, if realised, a sum of Rs. 15,000 should be paid to the son and daughters of the deceased under section 357 (1) (*c*) of the Criminal Procedure Code (II of 1974). The other two accused were acquitted by the High Court. We are not concerned in this appeal with the legality of the appellant's conviction or with the acquittal of his daughter and son-in-law. The special leave granted by this Court is limited to the question of the propriety of the fine imposed by the High Court.

2. The reason and occasion for imposing the sentence of fine was that an application was filed before the High Court under section 482 of the Criminal Procedure Code by a son and two daughters of the deceased praying that the appellant, his son and daughter-in-law be asked to pay to them, as heirs of the deceased, compensation in the sum of Rs. 40,000 for the death of their father.

3. Section 482 of the Code under which the heirs of the deceased filed the application for compensation corresponds to section 561-A of the Criminal Procedure Code of 1898. It saves the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. A provision which saves the inherent powers of a Court cannot override any express provision contained in the statute which saves that power. This is put in another form by saying that if there is an express provision in a statute governing a particular subject-matter there is no scope for invoking or exercising the inherent powers of the Court because the

Court ought to apply the provisions of the statute which are made advisedly to govern the particular subject-matter. From this it will be clear that the application made by the heirs of the deceased for compensation could not have been made under section 482 since, section 357 expressly confers power on the Court to pass an order for payment of compensation in the circumstances mentioned therein. That did not, however, affect the power of the High Court to deal with the application because though the application was wrongly described as having been made under section 482 the High Court could deal with it as if it were made under section 357 of the Code. That in fact is what the High Court proceeded to do, for it passed the order of compensation not under section 482 but under section 357 (1) (*c*) of the Code. . .

4. Section 357 of the Code of Criminal Procedure (II of 1974), reads thus:

> "357. *Order to pay compensation.*—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—
>
> (*a*) in defraying the expenses properly incurred in the prosecution;
>
> (*b*) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a civil Court;
>
> (*c*) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act (XIII of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
>
> (*d*) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reasons to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
>
> (2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.
>
> (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
>
> (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
>
> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this section."

5. Clauses (*a*), (*b*) and (*d*) of section 357 (1) need not be considered firstly because the High Court has passed the order of compensation under clause (*c*) and secondly because those clauses have no application. No order having been passed by the High Court for defraying the expenses incurred in the prosecution clause (*a*) does not come for consideration. Clause (*b*) has no application to cases in which the heirs of a person whose death has been caused apply for compensation because that clause deals with the payment of compensation to the very person to whom any

loss or injury has been caused as a result of the offence committed against him or his property and when compensation is recoverable by *such person* in a civil Court. Clause (*d*) deals with a different class of cases altogether and need not detain us.

6. Clause (*c*) of section 357 (1) under which the High Court has passed the order for compensation enables the Court to direct that the whole or any part of the fine recovered may be applied in paying compensation to the persons who are under the Fatal Accidents Act, 1855 entitled to recover damages from the person sentenced for the loss resulting to them from the death of the person whose heirs, as described in the Act of 1855, they claim to be. Since under the Act of 1855, persons who may be compensated are the wife, husband, parent (including grand-parents) and child (including grand-children and step-children), the application filed in the High Court was maintainable at the instance of the son and daughters of the deceased.

7. It cannot however be overlooked that the order for compensation can be passed under section 357 (1) (*c*) only when "a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part". We are concerned in this appeal to examine primarily the legality and propriety of the sentence of fine imposed by the High Court because upon that would depend the efficacy and indeed the very existence of the order for payment of compensation to the heirs of the deceased. The compensation, as provided in the section, has to come out of the fine. Therefore, if on a proper application of the principles of sentencing, the fine imposed by the High Court is found to be excessive and has therefore to be reduced, the order regarding the payment of compensation must suffer a corresponding variation.

8. There can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine under section 302 of the Penal Code. That section provides that whoever commits murder shall be punished with death, or imprisonment for life, and "shall also be liable to fine". That is why section 357 (1) of the Code speaks of "a sentence (including a sentence of death) of which fine forms a part". That is only an instance of the practical application of section 302 under which not only a sentence of imprisonment for life but even a sentence of death can legitimately be combined with a sentence of fine.

9. But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotton wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see, for example, *State* v. *Pandurang Shinde*[1]), but before imposing the sentence of fine particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circum-

1. A.I.R. 1956 Bom. 711.

stances of the case. As observed by this Court in *Adamji Umar Dalal* v. *The State of Bombay*[1], determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court Mahajan, J., observed in that case that:

> "in imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases" (page 177)".

Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300 to Rs. 4,000 on the ground that due regard was not paid by the lower Court to the principles governing the imposition of a sentence of fine.

10. The High Court imposed in the instant case a fine of Rs. 20,000 on the ground that "the deceased was aged about 48 years and was actively supervising the cultivation of the family lands and would have lived for another 15 to 20 years with his abilities intact, and the loss to the dependants, *viz.*, the son and daughters would be about Rs. 20,000". Except for the bald and bare statements contained in the petition for compensation filed by the heirs of the deceased, there is no warrant for the assumption made by the High Court as regards the retention of "abilities in tact" or as regards the extent of "loss to the dependants".

11. It appears to us that the High Court first considered what compensation ought to be awarded to the heirs of the deceased and then imposed by way of fine an amount which was higher than the compensation because the compensation has to come out of the amount of fine. Apart from the fact that even the compensation was not fixed on any reliable data, the High Court, with respect, put the cart before the horse in leaving the propriety of fine to depend upon the amount of compensation. The first concern of the Court, after recording an order of conviction, ought to be to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and the sentence, including the sentence of fine, must not be unduly excessive. In fact, the primary object of imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realised, which can happen only when the fine is not unduly excessive having regard to all the circumstances of the case, including the means of the offender.

12. Section 357 (1) (*c*) of the new Code corresponds to section 545 (1) (*bb*) of the Code of 1898 which was introduced by section 110 of Amending Act XXVI of 1955. The Statement of Objects and Reasons of that Act shows that the Joint Committee took the view that in suitable cases, the person who causes death should compensate the heirs and dependants of the deceased for the loss resulting from the death. The Joint Committee was in full agreement with the view that in a case where death has resulted from homicide, the Court should award compensation to the heirs of the deceased because that would result "in settling the claim once for all by doing away with the need for a further claim in a civil Court, needless worry and expense to both sides of the party". The views of the Joint Committee incorporated in the Statement of Objects and Reasons to the Amending Act of 1955 are undoubtedly entitled to consideration but those views only reflect that there should reside in the criminal Court the power in appropriate cases to pass an order of compensation in favour of the heirs of the deceased. It cannot, however, be overlooked that since by section 357 (1) (*c*) of the new Code and its precursor, section 545 (1) (*bb*) of the old Code, compensation can only come out of fine, it is

1. 1951 S.C.J. 820: 1952 S.C.R. 172: 54 Bom. L.R. 400: A.I.R. 1952 S.C. 14.

always necessary to consider in the first instance whether the sentence of fine is at all called for, particularly when the offender is sentenced to death or life imprisonment. If so, the fine must not be excessive, having regard to all the circumstances of the case like motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine.

13. The High Court, instead of applying its mind to these factors, considered only what compensation the heirs of the deceased ought to receive. And that question it decided on inadequate data. In view of the fact that the appellant was under the sentence of death since its imposition by the Sessions Court and its reduction to life imprisonment by the High Court and since a sentence of life imprisonment has been imposed on the appellant, that being the only other sentence permissible under the law, the fine of Rs. 20,000 imposed by the High Court seems to us unduly excessive. In the circumstances we reduce it to a sum of Rs. 3,000 and direct that the fine or so much of it as is recovered shall be paid to the son and daughters of the deceased who had filed the petition in that behalf in the High Court.

V.K. *Order accordingly.*

[END OF VOLUME (1978) 1 M.L.J. (SUPREME COURT.)].